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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 632+713

BEATRICE ALEXANDER, et als.,
Petitioners,

vs.

HOLMES COUNTY BOARD OF EDUCATION, et als..
Respondents.

(Including Consolidated Cases)

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, INCLUDING OBJECTIONS TO PETITION WITH MOTION TO ADVANCE, AND CROSS-PETITION FOR WRIT OF CERTIORARI WITH MOTION TO EXPEDITE HEARING

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INDEX

I. Objection to Motion to Advance and to the Petition for Writ of Certiorari 3

II. Response to Petition for Writ of Certiorari 4

1. Preliminary Statement 4

2. Question Stated by Movants and Petitioners 4

3. Question Actually Presented by Motion and Petition 14

4. The Divergent Plans of Desegregation Filed by HEW and the School Districts Have Not Been Considered or Approved by Either the District Court or the Court of Appeals 16

5. Statement of Facts 17

6. The Order Entered by the Court of Appeals on August 28th Is Based upon a Finding of Fact, Supported by the Record, Made by Both the District Court and Court of Appeals, and Should Not Be Disturbed 23

7. Vacating the Amendment of August 28th Will Accomplish No Appreciable Expedition of Action in These School Suits and Would Be Detrimental to the Interest of All Students 26

8. The Petition for Writ of Certiorari Being Directed to the Amendment of a Judgment, the Same Should Be Dismissed or, in the Alternative, Granted As Being Applicable to the Entire Judgment 27

III. Cross-Petition for Writ of Certiorari 28

1. Judgment and Opinion Below 29

2. Jurisdiction 29

3. Reservation of Rights 30

4. Questions Presented for Review 30

5. Constitutional Provisions and Statutes Involved 32

6. Preliminary Statement 34

7. Statement of Facts 36

8. Argument Amplifying the Reasons Relied Upon for Allowance of the Cross-Petition for Writ of Certiorari 36

(1) The school districts have followed their Constitutional duty as announced and as changed from year to year by the Supreme Court and the Court of Appeals of the Firth Circuit. The districts are now characterized as "reluctant" and "recalcitrant" because total compulsory integration removing or substantially diminishing racial imbalance has not been already achieved "after 15 years" 36

(2) A freedom of choice plan is the proper vehicle to set up and maintain schools conforming to all Constitutional guarantees and when such plan and the school system are administered fairly and without discrimination, all vestiges of a dual discriminatory racial school system are eradicated 47

(3) The construction by the Court of Appeals of the Fifth Circuit of the application of Section 1 of the Fourteenth Amendment to public schools, announced in *Hinds County* and other cases, conflicts with decisions of this Court 65

(4) The Court of Appeals of the Fifth Circuit is in direct conflict with the other Circuits. *Jefferson I* and *Jefferson II* (as gradually expanded and varied by sixteen panels) now require compulsory integration in the student bodies and faculties of all schools, leading to the ultimate end of racial balance 72

(5) Resumé of facts 84

Prayer 96

Exhibit A—Petition for Rehearing in Banc and for Stay of Proceedings in the United States District Court for the Southern District of Mississippi, or, in the Alternative, for Recall of Mandate of This Court 1e

Exhibit B—Portions of Testimony in the United States of America v. Hinds County School Board 21e

Exhibit C—Motion in the Court of Appeals, Letter from Robert H. Finch, and Amended Order 35e

Exhibit D—Motion by the Defendants in the Above Styled Consolidated Cases Joining in the Motion Therein Filed by the Attorney General of the United States in Behalf of Secretary Robert H. Finch of the Department of Health, Education and Welfare and the United States of America 40e

Cases and Other Authorities

Acree v. *Richmond County*, 399 F.2d 11 (1968) 74

Adams v. *Mathews*, 403 F.2d 181 (5th Cir. 1968) 15, 53, 57, 69, 70, 71, 73, 75, 78, 79

Armstrong v. *Bd. of Ed. of the City of Birmingham*, 333 F.2d 47 (1964) 43

Augustus v. *Bd. of Public Instruction of Escambia Cty., Fla.*, 306 F.2d 832 (1962) 41

Avery v. *Wichita Falls Ind. Sch. Dist.*, (1956) 241 F.2d 230 66

Bell v. *Gary*, (7th Cir. 1963), 324 F.2d 209, Cert. denied, 377 U.S. 924 74

Berenyi v. *District Director*, 87 S.Ct. 666, 385 U.S. 630, 17 L.Ed.2d 656 (1967) 25

Boykins v. *Fairfield*, 399 F.2d 11 (1968) 74

Broussard v. *Houston Ind. School District*, 395 F.2d 817 ..... 51, 52, 65, 74

Brown v. *Board of Education*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) 16, 25, 26, 39, 40, 41, 46, 47, 56, 65, 66, 81

Brown (II) v. *Bd. of Ed.*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 ..... 47-48, 65, 66

Bush v. *Orleans Parish School Bd., et als.*, 308 F.2d 491 (1962) 41-42

Calhoun, et als. v. *Latimer, et als.*, 321 F.2d 302 (1963) 42

Carr v. *Montgomery Cty.*, 23 L.Ed.2d 263 ..... 56, 67, 68, 69

Case Co. v. *Borak*, 84 S.Ct. 1554, 377 U.S. 426, 12 L.Ed. 2d 423 (1964) 25

Clark v. *Bd. of Ed. of Little Rock School District*, 369 F.2d 661 (1966), Rehearing denied, 374 F.2d 569 ..... 60, 61, 74, 82

Cooper v. *Aaron*, 358 U.S. 1 (1958) 26, 48, 60, 65, 66

Cumberland Tel. & Tel. Co. v. *Louisiana Public Serv. Com.*, 67 L.Ed. 217 (1922) 26

Davis v. *Bd. of School Commissioners of Mobile Cty.*, 364 F.2d 896 45

Deal v. *Cincinnati*, 369 F.2d 35 (6th Cir. 1966) 74, 77, 78

Downs v. *Bd. of Education of Kansas City*, 336 F.2d 988 (1964), cert. denied, 380 U.S. 914, 85 S.Ct. 989, 13 L.Ed.2d 800 (1965) 74, 80-81

Duval v. *Braxton*, 402 F.2d 900 (1968) 43, 57, 73

East Baton Rouge Parish School Bd. v. *Davis*, 287 F.2d 380 41

Gaines v. *Daugherty Cty. Bd. of Ed., et als.*, 329 F.2d 823 (1964), 334 F.2d 938 (1964) 43

Goss v. *Bd. of Ed. of Knoxville, Tenn.*, 406 F.2d 1183 ..... 48, 56, 57, 60, 61, 65, 66, 74, 76, 77, 78

Graves v. *Walton Cty.*, 403 F.2d 189 (1968) 57, 71, 73

Great Atlantic & Pacific Tea Co. v. *Supermarket Equipment Corp.*, 71 S.Ct. 127, 340 U.S. 147, 95 L.Ed. 162 (1950) 25

Green v. *County School Board*, 391 U.S. 430 (1968) 25, 26, 47, 48, 49, 50, 56, 57, 65, 67, 69, 74, 75, 77

Hall v. *St. Helena*, 287 F.2d 376 .....73, 75, 79

Hampton v. *Choctaw County* (Not yet reported) 70, 74, 78

Kellogg, et als. v. *Hicks, et als.*, 52 S.Ct. 450, 285 U.S. 502, 76 L.Ed. 903 (1932) 25

Louisiana State Bd. of Ed., et als. v. *Allen, et als.*, 287 F.2d 32 41

Louisiana State Bd. of Ed., et als. v. *Angel, et als.*, 287 F.2d 33 41

Lucy v. *Adams*, 134 F.Supp. 235 26

Mapp v. *Bd. of Ed. of Chattanooga, Tenn.*, 373 F.2d 75 .....74, 81

Meredith v. *Fair*, 9 L.Ed.2d 44 25

Monroe v. *Bd. of Com. of City of Jackson, Tenn.*, 380 F.2d 955 (1967) 37, 46, 47, 48, 49, 50, 57, 58, 60, 65, 67, 69, 74, 75

Plessy v. *Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) 41

Raney v. *Gould*, 391 U.S. 443, 20 L.Ed.2d 727 .....47, 48, 49, 50, 57, 65, 67, 69, 74, 75

Singleton v. *Jackson Municipal Sep. School District*, 348 F.2d 729 (1965) 44

Springfield School Committee v. *Barksdale*, 348 F.2d 361 74

Stell v. *Savannah-Chatham Cty. Bd. of Ed.*, (1964) 333 F.2d 55 66

U. S. Alkali Export Assn. v. *U. S.*, 325 U.S. 196, 89 L.Ed. 1534 (1945) 26

U. S. A. v. *Baldwin Cty.*, Not yet reported 74

U. S. A. v. *Bd. of Ed. Polk County*, 395 F.2d 66 70

U. S. A. v. *Cook County*, 404 F.2d 1125 (7th Cir., 1968) 74, 79

U. S. A. v. *Greenwood*, 406 F.2d 1086 (1969) 57, 73

U. S. A. v. *Indianola*, 410 F.2d 626 (1969) 73, 75

U. S. A. v. *Jefferson (I)*, 372 F.2d 836 ..... 31, 54, 58, 65, 66, 70, 72, 73, 74

U. S. A. v. *Jefferson (II)*, 380 F.2d 385 ..... 31, 38, 39, 46, 51, 54, 57, 58, 61, 65, 66, 67, 68, 72, 73, 74, 75

U. S. A. v. *Jefferson (III)*, (1969) Not yet reported 75

U. S. A. v. *Jefferson (IV)*, (1969) Not yet reported 71, 74

Civil Rights Act of 1964, Title VI 62

Civil Rights Act of 1964, Subchapter IV—Public Education 32

Civil Rights Act of 1964, Subchapter V—Federally Assisted Programs 33

Civil Rights Act of 1964, Subchapter VI—Equal Employment Opportunities 33

Federal Rules of Appellate Procedure, Rule 11 7

Pub.L. 88-352, Title 4, Secs. 401(b), 407(a), 410 83-84

Pub.L. 90-557 84

82 Stat. 969 84

Supreme Court Rule 12 6

Supreme Court Rule 20 ..... 3, 4, 5, 30

Supreme Court Rule 21 ..... 6, 28

Supreme Court Rule 21.4 ..... 8, 11
Supreme Court Rule 24.2 3
U.S.C., Title 38, Sec. 1254 (1) 30
U.S.C., Title 42, Sec. 2000c(b) 83

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 632

BEATRICE ALEXANDER, et als.,
Petitioners,

vs.

HOLMES COUNTY BOARD OF EDUCATION, et als.,
Respondents.

JOAN ANDERSON, et als.,
Petitioners,

vs.

UNITED STATES OF AMERICA and CANTON MUNICIPAL SCHOOL DISTRICT, et als., and MADISON COUNTY SCHOOL DISTRICT, et als.,
Respondents.

ROY LEE HARRIS, et als.,
Petitioners,

vs.

YAZOO COUNTY BOARD OF EDUCATION, et als., YAZOO CITY MUNICIPAL SEPARATE SCHOOL DISTRICT, et als., HOLLY BLUFF LINE CONSOLIDATED SCHOOL DISTRICT, et als.,
Respondents.

JOHN BARNHARDT, et als.,
Petitioners,

vs.

MERIDIAN SEPARATE SCHOOL DISTRICT, et als.,
Respondents.

DIAN HUDSON, et als.,
Petitioners,

vs.

UNITED STATES OF AMERICA and LEAKE COUNTY SCHOOL BOARD, et als.,
Respondents.

JEREMIAH BLACKWELL, JR., et als.,
Petitioners,

vs.

ISSAQUENA COUNTY BOARD OF EDUCATION, et als.,
Respondents.

CHARLES KILLINGSWORTH, et als.,
Petitioners,

vs.

ENTERPRISE CONSOLIDATED SCHOOL DISTRICT and QUITMAN CONSOLIDATED SCHOOL DISTRICT,
Respondents.

GEORGE MAGEE, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA and NORTH PIKE COUNTY CONSOLIDATED SCHOOL DISTRICT, et als.,
Respondents.

GEORGE WILLIAMS, et als.,
Petitioners,

vs.

UNITED STATES OF AMERICA and WILKINSON COUNTY SCHOOL DISTRICT, et als.,
Respondents.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, INCLUDING OBJECTIONS TO PETITION WITH MOTION TO ADVANCE, AND CROSS-PETITION FOR WRIT OF CERTIORARI WITH MOTION TO EXPEDITE HEARING

I.

OBJECTION TO MOTION TO ADVANCE AND TO THE PETITION FOR WRIT OF CERTIORARI

In accordance with the provisions of Supreme Court Rule 24.2 these Respondents object to the Petition for the Issuance of a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and the Motion to Advance filed in this cause for the following reasons:

1. *These cases are still pending before the Court of Appeals for the Fifth Circuit upon Petition for Rehearing En Banc.* Supreme Court Rule 20 is as follows:

20. Certiorari to a court of appeals before judgment. A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court. See *United States* v. *Bankers Trust Co.*, 294 U.S. 240; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330; *Rickert Rice Mills* v. *Fontenot*, 297 U.S. 110; *Carter* v *Carter Coal Co.*, 298 U.S. 238; *Ex parte Quirin*, 317 U.S. 1; *United States* v. *United Mine Workers*, 330 U.S. 258; *Youngstown Co.* v. *Sawyer*, 343 U.S. 579.

There is now pending before the Court of Appeals for the Fifth Circuit a Petition for Rehearing En Banc filed by all of these respondents and the other defendants in twenty-five consolidated cases which involve thirty-three school districts.[1] Pertinent extracts from the Petition for

1. The consolidated cases are captioned and numbered in the United States District Court for the Southern District of Mississippi as *United States* v. *Hinds County School Board, et als.*, No. 4075; *Buford A. Lee and United States, et als.*, v. *Milton Evans*, No. 2034; *United States* v. *Kemper County School Board, et als.*, No. 1373; *United States (and George Magee, Jr.)* v. *North Pike County Consolidated School District, et als.*, No. 3807; *United States* v. *Natchez Special Municipal Separate School District, et als.*, No. No. 1120; *United States* v. *Marion County School District, et als.*, No. 2178; *Joan Anderson and United States, et als.* v. *The Canton Municipal School District and The Madison County School District, et als.*, No. 3700; *United States* v. *South Pike County Consolidated School District, et als.*, No. 3984; *Beatrice Alexander, et als.* v. *Holmes County Board of Education, et als.*, No. 3779; *Roy Lee Harris, et als.* v. *The Yazoo County Board of Education, Yazoo City Municipal Separate School District and Holly Bluff Line Consolidated School District, et als.*, No. 1209; *John Barnhardt, et als.* v. *Meridian Separate School District, et als.*, No. 1300; *United States* v. *Neshoba County School District, et als.*, No. 1396; *United States* v. *Noxubee County School District, et als.*, No. 1372; *United States* v. *Lauderdale County School District, et als.*, No. 1367; *Dian Hudson and United States, et als.* v. *Leake County School Board, et als.*, No. 3382; *United States* v. *Columbia Municipal Separate School District, et als.*, No. 2199; *United States* v. *Amite County School District, et als.*, No. 3983; *United States* v. *Covington County School District, et als.*, No. 2148; *United States* v. *Lawrence County School District, et als.*, No. 2216; *Jeremiah Blackwell, Jr., et als.* v. *Issaquena County Board of Education, et als.*, No. 1096; *United States (and George Williams)* v. *Wilkinson County School Dis-*

Rehearing En Banc are attached hereto as Exhibit A and made a part hereof. A final judgment has not been entered thereon by the Court of Appeals for the Fifth Circuit.

2. *The movants and petitioners have wholly failed to make "a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court".* The recitations of the petition and the matters recited in this response demonstrate that the original Petition for Writ of Certiorari as filed is attempted to be limited solely to the timetable set up by the Court of Appeals in its judgment of July 3, 1969, as amended, which originally required certain action to be taken on or before September 1. The August 28, 1969 amendment of the judgment changed the timetable upon motion of the Attorney General of the United States acting in behalf of the United States and of the Department of Health, Education and Welfare. The Petition for Writ of Certiorari as filed attempts to exclude consideration of the merits of these cases. The change in a timetable fixed in these nine cases here clearly does not come within Rule 20. Sixteen cases are not affected. The hundreds of other school districts within the Fifth Circuit are not affected. The thousands of school districts throughout the United States are not af-

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trict, et als., No. 1160; *Charles Killingsworth, et als.* v. *The Enterprise Consolidated School District and Quitman Consolidated School District*, No. 1302; *United States* v. *Lincoln County School District, et als.*, No. 4294; *United States* v. *Philadelphia Municipal Separate School District, et als.*, No. 1368; *United States* v. *Franklin County School District, et als.*, No. 4256. The seven cases filed originally by private plaintiffs are numbered in the Court of Appeals as Cause No. 28030. The remaining nineteen cases, including the *North Pike* and *Wilkinson County* cases in which private plaintiffs were permitted to intervene, are numbered in the Court of Appeals as Cause No. 28042. None of the defendants and appellees in the suits consolidated in the Court of Appeals under Cause No. 28042 are respondents to the Petition for Writ of Certiorari other than the defendants and appellees in the cases of *United States and George Williams* v. *Wilkinson County School District* and *United States and George Magee, Jr.* v. *North Pike County Consolidated School School District.*

fected. Even these districts are affected only temporarily. No finding on the merits is included in the amendment of August 28, 1969. Yet the reasons advanced for the granting of the writ are based upon evidence alleged to have been introduced in the District Court contained in the District Court record transmitted to the Court of Appeals upon the appellate hearing of July 3, 1969.

3. *The movants and petitioners have failed to file the record as required by Supreme Court Rules 12 and 21.* It is required by Rule 21 that the petitioners file:

> . . . a transcript of the record in the case, including the proceedings in the Court whose judgment or decree is sought to be reviewed, which shall be certified by the clerk of the appropriate court or courts below. The entire record in the court to which certiorari is addressed shall be filed unless the parties agree that certified parts may be omitted as unnecessary for the determination of the Petition or the Writ, if it is granted.

The pleadings, briefs and other documents filed in the Court of Appeals and its judgment and orders form only a small part of the record in that Court. The appellate record in these cases consists of the original record in the District Court for the Southern District of Mississippi filed with the appellate court when the appeals were heard on July 3, 1969. This included a transcript of the hearings beginning October 7, 1968, and extending into December, 1968, together with all pleadings filed by the parties and other matters of record in the District Court in these consolidated cases. This transcript, together with the pleadings, plans of desegregation, reports, orders and other proceedings, became part of the record of the Court of Appeals upon the appeal heard July 3, 1969. The record was thereafter returned to the District Court for use related to the supplemental proceedings. The transcript of the hearing of August 21 and August 22, 1969, held by the District Court

by direction of the Court of Appeals, as well as the plans of desegregation filed by HEW and those filed by the school districts, the objections filed to such plans and additional reports filed in the District Court are also a part of the appellate record. All of these records are available to the petitioners under Rule 11 of the Federal Rules of Appellate Procedure:

> If the record or any part thereof is *required in the district court for use there pending the appeal,* the district court may make an order to that effect, and the clerk of the district court shall retain the record or parts thereof *subject to the request of the court of appeals,* and shall transmit a copy of the order and of the docket entries together with such parts of the original record as the district court shall allow *and copies of such parts as the parties may designate.*

The movants and petitioners have made no motion in the Court of Appeals for an order that the original record in the District Court be transmitted to the Court of Appeals and by it to this Court. Hence, the said motion and petition are not sustainable under the rules of this Court.

4. *The movants and petitioners have failed to reproduce and make available to the Court copies of necessary pertinent portions of the original record in these cases.* The only "appendices" attached to the Motion and Petition consist of opinions, orders and directives of the United States Court of Appeals and the United States District Court, together with copies of two letters. *The appendix does not even include a copy of the Motion filed by the Department of Justice* in its own behalf and in behalf of the Secretary of Health, Education and Welfare. The amendment complained of was granted upon this motion.

The letter dated August 19 appearing on pages 53a and 54a of the appendix was an exhibit to such motion. The only other portion of the record reproduced and attached

by the movants and petitioners is a letter dated August 11, 1969, appearing on pages 40a through 50a of petitioners' appendix. This is one of the thirty exhibits (Tr. page 244) introduced at the hearing held by the United States District Court on August 21 and August 22 (at the request and direction of the Court of Appeals of the Fifth Circuit). This letter was introduced at page 123 of the transcript. Such transcript has not been filed with the Petition for Writ of Certiorari. However, these respondents and cross-petitioners have filed with the Clerk of this Court under Rule 21.4 a certified copy of the transcript taken on August 21 and August 22, 1969, upon the hearing of the motion by the Attorney General of the United States. Pertinent extracts therefrom are attached hereto as Exhibit B for the information of the Court.

II.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

1. Preliminary Statement

We are amazed at the lack of knowledge of the evidence displayed in the Petition for Writ of Certiorari herein filed. The writer of this brief has participated in judicial proceedings in state and federal courts in many states over a period of forty years and has never observed recitations in any petition which were such a complete departure from the facts appearing in the record.

2. Question Stated by Movants and Petitioners

In the Petition for Writ of Certiorari the petitioners state the "*Questions Presented*" as follows (numbers inserted by us for convenient reference):

> Did the Court of Appeals err in (1) *granting fourteen Mississippi school districts* (2) *an indefinite delay* (3) *in implementing* school desegregation plans (4)

based upon generalized representations by the United States Department of Health, Education and Welfare that delay was necessary (5) *for preparation of the communities*?

Each phrase underlined by us is a clear misconstruction of the evidence and proceedings contained in this record. We call the Court's attention to the following phrases:

(1) *"Granting fourteen Mississippi school districts"*. To the contrary the motion was made by the Department of Justice in behalf of the United States and of the Secretary of Health, Education and Welfare, a copy of such motion being attached hereto as Exhibit C. Additional time was granted *to the Office of Education of the Department of Health, Education and Welfare* (acting in conjunction with the school districts) to *"develop and present* to the District Court on or before December 1, 1969, *acceptable plans of desegregation"*. This was done upon motion filed by the Attorney General in behalf of the United States and as attorney for the Secretary of Health, Education and Welfare. The new timetable was not initiated by any of the defendants: It was stipulated of record by the attorneys for the private plaintiffs as follows (Exhibit B hereto, pp. 21e-22e):

> BY MR. SATTERFIELD: May I further inquire of counsel for the individual Plaintiffs, by the filing of this objection as entitled, as I understand, it is intended at least to be applicable to all cases in which they are individual plaintiffs. Does counsel file this objection recognizing that the motion made by the Department of Justice on behalf of the Secretary and of the United States, does apply to those seven cases with a possibility of the addition of two more?
>
> BY MR. AMAKER: Well, we recognize that, yes.

As stated in Note 1 of the Petition, the private plaintiffs filed seven suits and were permitted, at the August 21, 1969, hearing, to intervene in two additional cases.

The Secretary of Health, Education and Welfare was directed by the Court to file on August 11, 1969, plans of desegregation in all of the twenty-five consolidated cases. *The Secretary did file original plans in each case.* See testimony of Mr. Jordan, pertinent portions of which are included in Exhibit B hereto. The school districts also filed differing plans on August 11, 1969. Agreement not having been reached largely due to press of time, the school districts also filed objection to the HEW plans on August 21, 1969.

It being impossible to resolve the differences before the timetable deadline of September 1, 1969, either by negotiation or by hearings affecting the thirty-three districts, the Attorney General of the United States filed his motion. The school boards simply joined in the motion made in behalf of the Secretary of Health, Education and Welfare. A copy of such joinder is attached hereto as Exhibit D. It was stipulated by individual plaintiffs that the motion filed by the Attorney General of the United States was applicable to these nine cases.

(2) "*An indefinite delay*". There was nothing indefinite about the delay granted. The change in the timetable requested by the Secretary of Health, Education and Welfare was granted to permit it (in conjunction with the school districts) to develop and present to the District Court on or before December 1, 1969, acceptable plans of desegregation. The next step required was approval by the District Court unless objections were filed within fifteen days. The District Court was then required to hold a hearing within fifteen days after objections were filed to enter findings of fact and conclusions of law in each case. In addition, October 1, 1969, was set as the limit for the filing of a program developed by the Office of Education and the boards "to prepare its faculty and staff for conversion from

the dual to the unitary system". In general, this schedule has been met and programs have been filed approved by both HEW and the several school districts. The schedule also included the following requirement (Petition page 78a):

> It is a condition of this extension of time that the plan as submitted and the plan as finally approved shall require significant action toward disestablishment of the dual school systems during the school year September 1969-June 1970.

(3) *"Based upon generalized representations by the United States Department of Health, Education and Welfare"*. We have filed with the Clerk of this Court under Supreme Court Rule 21.4 a transcript of the entire testimony taken August 21 and 22, 1969, at the hearing held at the direction of the Court of Appeals. The testimony of Mr. Jordan, head of the Atlanta Regional Office of the Department of Education, was particularly specific and detailed as hereinafter discussed. It pointed out the reasons why *it had not been possible for HEW to develop full, complete and satisfactory plans* nor to prepare for the implementation thereof.

(4) *"That delay was necessary for preparation of the communities"*. This is contrary to the facts. This time was granted for the reasons advanced by Mr. Finch, Secretary of Health, Education and Welfare, in his letter to Honorable John Brown, Chief Judge of the Court of Appeals of the Fifth Circuit. Such letter (Petitioners' Appendix, pp. 53a and 54a) was attached as an exhibit to the Motion by the Attorney General of the United States and made a part thereof by reference (Exhibit C hereto). Mr. Finch's statements thus became allegations of the motion upon which the Court of Appeals based its action:

> On Thursday of last week, I received the terminal plans as developed and filed by the experts from the

Office of Education. *I have personally reviewed each of these plans.* This review was conducted in my capacity as Secretary of the Department of Health, Education and Welfare and as the Cabinet officer of our government charged with the ultimate responsibility for the education of the people of our Nation.

In this same capacity, and bearing in mind the great trust reposed in me, together with the ultimate responsibility for the education of the people of our Nation, *I am gravely concerned that the time allowed for the development of these terminal plans has been much too short for the educators of the Office of Education to develop terminal plans* which can be implemented this year. The administrative and logistical difficulties which must be encountered and met in the terribly short space of time remaining must surely in my judgment, produce chaos, confusion and a catastrophic educational setback to the 135,700 children, black and white alike, who must look to the 222 schools of these 33 Mississippi districts for their only available educational opportunity.

I request the Court to consider with me the shortness of time involved and the administrative difficulties which lie ahead and permit additional time during which experts of the Office of Education may go into each district *and develop meaningful studies in depth and recommend terminal plans to be submitted to the Court not later than December 1, 1969.*

The motion was not for the purpose of preparing communities for acceptance of plans. *It was to allow time for the development of terminal plans based upon meaningful studies in depth.* It was to give the Secretary of Health, Education and Welfare sufficient time, after proper studies and in collaboration with the school districts, to recommend terminal plans to be submitted to the Court not later than December 1, 1969. The "preparation of the communities" is only incidental to the implementation of sound and proper plans.

Honorable John Leonard, Assistant Attorney General of the United States, Civil Rights Division, stated the position of the United States and the Secretary of Health, Education and Welfare as follows (Exhibit B hereto, pp. 22e-23e):

> I think it is also safe to say that most of the school boards did cooperate in that at least information was provided and the educators were received by the colleagues in the district and were able to draw and pull together the information necessary to provide some kind of a plan.
>
> I think, however, that it became obvious to the Secretary of Health, Education and Welfare that as the time pressure was building here both with respect to the field work that needed to be done, the investigation by his people, out in the field, in the districts, that it soon became apparent to him that in order to have, in fact, an orderly movement from a dual to a unitary system, in order to accomplish in fact what we believe the Supreme Court seeks, that is a plan that works, one that is going to accomplish the objectives, *both with respect to the development of the plans and with respect to the implementation of those plans, that the time was simply too short.*
>
> Now, I would be less than candid if I didn't say that the Government was somewhat embarrassed by this because we gave the Fifth Circuit some assurance that there was time but we are lawyers, not educators, and it is the educational judgment it seems to me, that's important here. These are the men who are trained to educate our children. They are the ones that have to make the administrative and the educational decisions that go with bringing about not just a unitary system but a plan for education in the framework of elimination of racial discrimination that's going to, in fact, result in quality education.

Mr. Jesse J. Jordan, Senior Program Officer of the United States Office of Education, Atlanta, Georgia (who

was in charge of development of all the plans of desegregation for HEW for the thirty-three districts included in the twenty-five consolidated cases), testified (Exhibit B hereto, p. 30e):

> Q. Back to the plans Mr. Jordan, with respect to the time frame in which they were developed. Do you have an opinion as to whether or not that time frame had any effect on the validity of the plans themselves?
>
> A. I think probably the plans themselves were sound; however, my personal belief in developing plans of this nature, it is necessary to do a number of curriculum studies which time did not allow for. Curricular was not examined at all, finance, no financial studies were made, no social or economic study was made to determine the needs of any given district, *and if these studies were made, you probably will come up with a superior plan than just a purely segregated plan. You would come up with a plan for educational change for which the desegregated is a part. . . .*

3. Question Actually Presented by Motion and Petition

Shall this Court reverse the finding of fact and law by the Court of Appeals affirming the findings of the District Court that the Secretary of Health, Education and Welfare, the United States and the local school boards required and should be granted sufficient time to develop reasonable and satisfactory plans of desegregation within a definite time schedule?

The nine captioned cases are pending in the United States District Court for the Southern District of Mississippi. All were included in the twenty-five cases consolidated in the District Court for the original hearing and later consolidated upon appeal by the Court of Appeals of the Fifth Circuit under Docket Nos. 28030 and 28042. These cases generally are referred to as *U.S.A.* v. *Hinds County*

Board et als. Originally, the captioned cases were consolidated with thirty-five other cases from various district courts and heard by the Court of Appeals upon motion to set aside District Court docket entries. They were captioned *Adams* v. *Mathews,* 403 F.2d 181 (5th Cir. 1968).

All twenty-five of the consolidated cases were included in the judgment and opinion of the Court of Appeals dated July 3, 1969 (Petitioners' Appendix B, p. 28a), as amended by order dated July 25, 1969 (Petitioners' Appendix B, p. 38a), the Findings of Fact and Conclusions of Law by the District Court dated August 26, 1969 (Petitioners' Appendix D, p. 56a), and also order adopted by the Court of Appeals of the Fifth Circuit on August 28, 1969, amending the judgment of July 3, 1969 (Petitioners' Appendix D, p. 71a).

The judgment and mandate of the Court of Appeals dated July 3, as amended on July 25, reversed the action of the District Court which had found that the plans adopted by each school board under *Jefferson*-type decrees were operating in conformity with the teachings of *Green, Monroe* and *Raney.* The judgment and mandate did not approve any plan but set up a time schedule ending September 1, 1969, for formulation, submission and approval of such plans. The mandate required a hearing on such plans by the District Court and the adoption of a plan conforming to Constitutional standards, all to be accomplished on or before September 1, 1969.

As set out in the "Findings of Fact and Conclusions of Law by the District Court" (Petitioners' Appendix D, p. 56a), the Attorney General on behalf of the United States and the Secretary of Health, Education and Welfare, introduced evidence demonstrating that it was impossible for the original schedule to be met. The Findings of Fact by the District Court were affirmed by the Court of Appeals.

4. The Divergent Plans of Desegregation Filed by HEW and the School Districts Have Not Been Considered or Approved by Either the District Court or the Court of Appeals

No new plan of desegregation for any one of the districts involved in the twenty-five consolidated cases has been considered by either the District Court or the Court of Appeals. The Secretary of Health, Education and Welfare filed in the Court of Appeals a formal motion (Exhibit C hereto, p. 35e) with his letter attached (supported by the evidence in this proceeding). He requested time to develop and present to the District Court on or before December 1, 1969, acceptable plans of desegregation. The defendant districts filed proposed plans on or about August 11, 1969, reserving all of their rights under the pending Motion for Rehearing En Banc, their rights to file Petition for Writ of Certiorari, and other procedural rights. They alleged in their joinder in the motion of the Attorney General that it was "impossible to work out a plan satisfactory to either the Court, the defendants or the plaintiff" in the time allowed (Exhibit D hereto, p. 43e).

No hearing has been had by either the District Court or the Court of Appeals upon the merits of any plan of desegregation. Hence, if the Motion and Petition are granted, the new plans to be filed by the Secretary of Health, Education and Welfare after full and complete investigation, study in depth, and consultation with the school districts, will not be before the Court; the original plans filed by the Secretary have not been considered by either the District Court or the Court of Appeals. The plans filed by the school districts have not been considered by the District Court or the Court of Appeals. There is nothing to be put into effect in these school districts under the teachings of *Brown, Green, Monroe* and *Raney*.

If the Motion and Petition are granted, it would simply reinstate an impossible time schedule, deny the Secretary of Health, Education and Welfare and the Department of Justice an opportunity to carry out the procedures outlined in the motion and evidence presented by them and deny the school districts both a hearing by the District Court and the opportunity to collaborate with HEW in developing terminal plans.

5. Statement of Facts

A. *The Court of Appeals proceeded in these cases with all possible dispatch.* All districts have been operating under model Jefferson decrees and were in compliance with such decrees. After the decision in *Green,* plaintiffs filed motions in the District Court for supplemental relief, seeking the formulation and implementation of desegregation plans other than freedom-of-choice. The District Court found that these school districts were in compliance with *Green* and denied these motions by order entered on or about May 16, 1969 (Appendix D to Petition, pp. 1a-22a). After notices of appeal and preliminary steps the following transpired:

(1) *On June 23, 1969,* the United States of America filed Motion for Summary Reversal and Motion to Consolidate Appeals.

(2) *On June 23, 1969,* the Clerk of the Court of Appeals mailed a letter stating the motion of the United States of America would be presented on July 3, together with any response filed prior to that date by opposing counsel.

(3) *On June 25, 1969,* the Court of Appeals issued a directive to counsel of record (Appendix B to Petition, p. 24a) that the Court would hear oral argument on these cases "on motion for summary reversal and *the merits* in all of the cases".

(All emphasis in this response is ours unless otherwise indicated.) This directed that the argument would be held in New Orleans beginning at 9:30 A.M., July 2, 1969, and any memoranda or responses must be filed with the Clerk by noon, July 1, 1969. The letter further recited the Court had taken notice of the District Court's order with respect to the record; but, since appeal was being expedited on the original record, the United States Attorney should make arrangements with the District Clerk to transmit to the Clerk of the Court of Appeals the entire record of the District Court so that the same would be available to the Court if needed during the argument and summation. It was further stated that the Court recognized that "this is a huge record involving a large number of parties and matters of great public interest and importance". *This letter was received by counsel on June 25 and June 26.*

(4) The directive of the Court of Appeals contained the following finding by the Court (Appendix B to the Petition, p. 26a):

> 6. The Court's general approach will be to *accept the fact findings of the District Court* and to determine what, if any, legal relief is now required based thereon. *To the extent that appellants, private or government, assert that any one or more specific fact findings* (as distinguished from mixed questions of law and fact) *are clearly erroneous, the appellants concerned shall xerox copies of pertinent excerpts of the transcript of the evidence* for use by the Judges (4 copies) which may be made available during argument.

No party filed xerox copies of pertinent excerpts from the record asserting that any findings of fact of the District Court were erroneous.

(5) *On July 2, 1969,* oral argument was presented and was concluded before the Court adjourned for lunch.

(6) *On July 3, 1969,* the judgment of the Court of Appeals was entered. It was amended, ex mero motu, July 25, 1969.

B. *The schedule provided in the Appeals Court Order of July 3 (as amended July 25) required immediate action, without time for study by HEW or collaboration with the school districts.*

The Appeals Court Order of July 3 (later amended on July 25) provided (Appendix B to Petition, pp. 28a and 38a):

(1) The District Court should forthwith request that educators from HEW collaborate with the defendant school boards in the preparation of plans to disestablish the dual school systems in question (the District Court so ordered on July 5, 1969).

(2) Each board and HEW should present to the District Court before August 11 an acceptable plan of desegregation for each district.

(3) If an agreed plan was submitted by a board and HEW on August 11, the plan would be approved unless within seven days a party filed objections grounded on Constitutional standards.

(4) If no agreement was reached, HEW should file its plan by August 11 and the parties would have ten days within which to file objections or suggested amendments. The District Court would hold a hearing and enter a plan by August 31 which conformed to Constitutional standards.

(5) A plan for each school district was required to be entered not later than September 1, 1969, to be effective for the beginning of the 1969-70 school year.

On July 15, pursuant to this expedited plan of action, educators employed by HEW met at Mobile, Alabama, to plan their collaboration with the thirty-three districts embraced in the orders of the Court of Appeals and the District Court (Exhibit B, pp. 27e-28e).

C. *The timetable fixed by the Court of Appeals (upon recommendation of the Department of Justice) when placed in operation was found by HEW to be impossible of effective execution.*

Jessie J. Jordan is an experienced educator who believes a unitary school system is superior to a dual school system. He is Senior Program Officer for Title Four in the United States Office of Education in the Atlanta region and coordinated the overall effort of planning for the thirty-three Mississippi school districts and reviewed all of the plans. (Exhibit B hereto, pp. 25e-26e).

Between July 16 and July 23 these teams made their first trip into Mississippi. Mr. Jordan testified that on this first trip ". . . the teams gathered statistical information on enrollment, certain building information, pupil location maps where available, school location maps, visitation of schools and tried to get a general feeling and input from the school system." (Exhibit B, p. 28e).

On July 23, all teams returned to Atlanta and worked on ". . . trying to put together some tentative recommendation for the school system." (Exhibit B, p. 28e).

Between July 29 and extending through August 1, the teams made a second trip into Mississippi. Mr. Jordan

said: "On this trip the teams met with the school systems the second time to present some of their recommendations and to try to get input from the school systems." (Exhibit B, p. 28e).

From August 2 through August 6, all teams were in Atlanta formalizing the plans upon which they were working. Mr. Jordan testified:

> After they had been formalized, duplicated and so forth, a third trip was made into Mississippi from the 7th through the 9th at which time the plans were formally presented to the superintendent or the board or whoever the superintendent wished present.

On August 11 such HEW plans were filed with the Court. Mr. Jordan further testified:

> The teams were working on a very tight schedule and each team had to, depending on the size of the school system, had from two to six districts to cover which meant, I believe, I'm not absolutely positive of this, but I would say that the average time in a school district on the first visit was a day and a half. The average on the second visit, maybe a half a day.

Because of the lack of time to confer and collaborate, none of the thirty-three defendant districts reached an agreement with HEW.

On August 11 each defendant district also filed a separate plan with the District Court.

Prior to August 19, Mr. Jordan reported voluntarily and on his own initiative by telephone to his superior, Dr. Anrig, that in his expert judgment more time was required for development and implementation of plans for desegregation in the subject school districts.

On or before August 21, the districts filed objections to the plans of HEW and attached affidavits containing testimony supporting their own plans and criticizing the plans of HEW. No objections to the school district plans were thus filed by the plaintiff or intervenors.

On August 26, after the hearings held August 21 and 22, the District Court filed its Findings of Fact and Conclusions of Law and recommended that the Court of Appeals grant the relief sought by the United States of America (Appendix to the Petition, p. 56a).

On August 28 the Court of Appeals affirmed the Finding of Fact and Conclusions of Law of the District Court, after considering the record of the August 21st hearing and in light of the full record in these cases. It sustained the motion of the United States of America and amended its previous judgment as herein above set forth (Petitioners' Appendix, p. 71a).

In addition to Findings of Fact based upon the testimony of Mr. Jordan, the District Court found as follows upon the testimony of Mr. Howard O. Sulling, another witness for the United States and Program Officer for the United States Office of Education in Atlanta (Petitioners' Appendix D, pages 67a-68a):

> The witness was of the opinion and the Court finds, *that in order to formulate and implement successful and effective desegregation plans, the additional time requested will be required.* This witness suggested additional programs which should be undertaken to effect a smooth, workable conversion to a completely unitary school system, such as a workshop for teachers and pupils to discuss potential problems of desegregation and their solution, as was done in other districts in which this witness worked, including some in South Carolina. These committees of students and teachers must meet with experts to obtain more

knowledge on how to solve problems that will arise. *The witness stated that all defendant school districts with which he dealt cooperated fully with his team but that his team was not authorized to negotiate any differences with the school boards.* The first time that the defendant school districts saw the HEW plan in written form was on August 7, 1969, at which time there could be no more collaboration from HEW's standpoint, that is, there could be no further change in the HEW plan which was filed subsequently in this Court in all these school district cases.

Even if the motion of the Government for additional time had not been filed in this case with all due deference, it is extremely doubtful if this Court could have physically complied with the mandate of the United States Court of Appeals for the Fifth Circuit, because of the devastating effect of super Hurricane Camille, which this Court does not have to take judicial notice of, because it has personal and actual knowledge thereof. This deadly, gigantic "hurricane-tornado" struck not only the Mississippi Gulf Coast where the undersigned Judges reside, but also caused great damages to many other parts of the State of Mississippi, including many of the areas in which the defendant school districts are located.

We embody in this Response by reference the detailed refutation of erroneous and unfounded statements in the original Petition which we set forth in the Cross-Petition for Writ of Certiorari.

6. The Order Entered by the Court of Appeals on August 28th Is Based upon a Finding of Fact, Supported by the Record, Made by Both the District Court and Court of Appeals, and Should Not Be Disturbed.

As set out above, the amendment of August 28 permits the consideration by the District Court of new plans developed by HEW and the school districts during the period

from August 31 to December 31st. At the same time, the Court required: (1) a program of faculty orientation for conversion from a dual to a unitary system to be adopted by October 1; (2) further study for better plans and more efficient implementation; (3) additional joint study by HEW and local boards looking toward improvement of and agreed plans of desegregation; and (4) a condition that plans submitted and approved call for significant actions to disestablish the dual school system during the September 1969-June 1970 school year.

Upon the evidence, including the testimony of experts presented by the United States, the District Court found (Petitioners' Appendix, p. 69a):

> In view of all of the above, this Court finds and concludes that it has jurisdiction to consider this motion and make findings of fact thereon and suggestions and recommendations to the appropriate panel of the United States Court of Appeals for the Fifth Circuit in these cases. This Court is further of the opinion and finds, as a matter of fact and of law, that the motion filed by the Government, joined in by the defendant school districts, is meritorious and should be granted for the foregoing reasons and for the further reasons that the granting of the requests made by the Government will, in truth and in fact, probably result in a smooth, workable conversion of the defendant school districts from a dual to a unitary system, with the elimination of the many problems of chaos and confusion referred to by the Secretary of HEW in his letter.
>
> It is therefore the recommendation of this Court that the appropriate panel of the Court of Appeals grant the amended motion filed by the Government in all of these cases, and then adopt and enter the proposed "New Amended Order" as revised in this hearing, which was filed by the United States and attached to its Amended Motion filed here and in the Court of Appeals.

The Court of Appeals reached a similar factual conclusion as follows (Petitioners' Appendix, p. 76a):

> Following this the Court has received and considered the findings of fact, conclusions of law and recommendations of the District Court, the record of the hearings, and the briefs and arguments of counsel, pro and con. On the basis of the matter set forth herein, the Court amends its order further as follows: [Here follows the amendment of August 28.]

The present petition seeks to vacate the August 28th amendment of the judgment, even though the District Court and the Court of Appeals have found as a fact that action upon the time schedule previously fixed would produce chaos, confusion and a catastrophic educational setback to the 135,700 children, black and white alike, who must look to the 222 schools of these 33 Mississippi districts for their only available educational opportunity. We respectfully submit that this is not required by *Brown* v. *Board of Education*, 1955, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, by *Green* v. *County School Board*, 1968, 391 U.S. 430.

The Supreme Court has consistently declined to take such action. *The Linseed King*, 1932, 52 S.Ct. 450, 285 U.S. 502, 76 L.Ed. 903; *J. I. Case Co.* v. *Borak*, 1964, 84 S.Ct. 1554, 377 U.S. 426, 12 L.Ed. 423; *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 1950, 71 S.Ct. 127, 340 U.S. 147, 95 L.Ed. 162; *Berenyi* v. *District Director*, 1967, 87 S.Ct. 666, 385 U.S. 630, 17 L.Ed. 656. In *Meredith* v. *Fair*, supra, Mr. Justice Black said:

> I further agree with the Court of Appeals that there is very little likelihood that this Court will grant certiorari to review the judgment of the Court of Appeals, *which essentially involves only factual issues.* (9 L.Ed.2d, p. 44).

The Supreme Court is reluctant to interfere with factual decisions of the lower Courts. *United States Alkali Export Ass'n* v. *United States*, 1945, 325 U.S. 196, 89 L.Ed. 1554. In *Cumberland Telephone & Telegraph Co.* v. *Louisiana Public Service Commission*, 1922, 67 L.Ed. 217, the Supreme Court said:

> But the court which is best and most conveniently able to exercise the nice discretion needed to determine this balance of convenience is the one which has considered the case on its merits, and therefore, is familiar with the record. (67 L.Ed., p. 224).

The action desired, if the present petition is granted, is easily distinguishable from that in *Lucy* v. *Adams*, supra, wherein the Supreme Court was asked to implement the findings of fact of the District Court (134 F.Supp. 235). In so doing the Supreme Court was not called upon to reverse or set aside the findings of fact of the lower Court, as would be the case if the present motion were granted.

To the contrary, this matter falls within the teaching of *Brown* v. *Board of Education*, supra, *Cooper* v. *Aaron*, 1958, 358 U.S. 1, and *Green* v. *County School Board*, supra, that the District Courts can best perform the necessary judicial appraisal for the implementation of desegregation of schools.

7. Vacating the Amendment of August 28th Will Accomplish No Appreciable Expedition of Action in These School Suits and Would Be Detrimental to the Interest of All Students

If the mandate which was in effect prior to August 28th were to be reinstated at this time, the original timetable would have to be revised to permit the District Court to carry out its function. All that could be gained from reinstating such mandate would be a hurried entry at some future date of partially completed and admittedly

inadequate plans, which future date might approach closely the December 1st to December 31st dates set in the amendment of August 28th. However, such order specifically requires "significant action toward disestablishment of the dual school system during the school year September, 1969-June, 1970."

The effect of reinstating the earlier order of the Court of Appeals would be to direct the District Court to hold hearings for each district and to enter new plans for desegregation (under whatever new timetable the Court of Appeals would deem appropriate). The only plans before the District Court are those submitted by HEW and those submitted by the school districts. The District Court is now confronted with the opinion of Secretary Finch that the plans HEW prepared should not be entered or implemented at this time, as the Secretary stated:

> I am gravely concerned that the time allowed for the development of these terminal plans has been much too short for the educators of the Office of Education to develop terminal plans which can be implemented this year. The administrative and logistical difficulties which must be encountered and met in the terribly short space of time remaining must surely in my judgment, produce chaos, confusion, and a catastrophic educational setback to the 135,700 children, black and white alike, who must look to the 222 schools of these 33 Mississippi districts for their only available educational opportunity.

8. The Petition for Writ of Certiorari Being Directed to the Amendment of a Judgment, the Same Should Be Dismissed or, in the Alternative, Granted As Being Applicable to the Entire Judgment

Under the statutes and the rules of this Court, a Writ of Certiorari will not lie to review the amendment of a judgment entered by a Court of Appeals. The statutes

were adopted and the rules were promulgated to permit the review of any *judgment* of a Court of Appeals. A piecemeal review of one or more amendments to a judgment cannot be sustained. Hence, this Petition for Writ of Certiorari should either be dismissed, or, in the alternative, should be construed to be a petition to bring before this Court the entire judgment entered on July 3, 1969, including the amendments of July 25, 1969 and August 28, 1969, together with all matters therein involved.

As will be set forth in the Cross-Petition for Writ of Certiorari herein filed, if such review is granted these respondents and cross-petitioners will move for an expedited hearing consistent with the full record being filed with this Court, sufficient time being allowed for preparation of appropriate appendices, and for full, complete and proper briefs by all parties.

For the foregoing reasons the respondents respectfully submit that their objections to the Petition for Writ of Certiorari herein filed and the Motion to Advance the same should be sustained and both such Petition and Motion should be denied.

III.

CROSS-PETITION FOR WRIT OF CERTIORARI

And now having fully responded to and answered the Petition for Writ of Certiorari herein filed and the Motion to Advance the same, all of the respondents named in the caption hereto (other than the United States of America) file this, their Cross-Petition for Writ of Certiorari under Rule 21 of the Rules of this Court against the Petitioners and the United States of America, subject to the reservation of rights hereinafter set forth. Cross-Petitioners adopt all of the allegations above set forth in their Response and make such allegations a part hereof by reference.

Cross-Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 3, 1969, as modified by order dated July 25, 1969, and by order dated August 28, 1969. Said judgment of the Court of Appeals of the Fifth Circuit is the same judgment which is the subject of the Petition for Writ of Certiorari filed by the Petitioners.

1. Judgment and Opinion Below

The original judgment with the opinion appended thereto was rendered on July 3, 1969 (Petitioners' Appendix B, page 28a). Said judgment has been amended by order entered by the said court on July 25, 1969 and later amended by order entered by the said court on August 28, 1969. Neither of said orders has been reported. As copies of the said judgment and the said amendments are attached to the Petition for Writ of Certiorari herein filed, the same are embodied herein by reference and copies are not attached to this Cross-Petition for Writ of Certiorari, under the provisions of Supreme Court Rule 21.

2. Jurisdiction

The judgment of the United States Court of Appeals for the Fifth Circuit was dated and entered on July 3, 1969. Opinion and mandate were issued on that date. Such judgment was amended by order entered July 25, 1969 and by order entered August 28, 1969. Petition for Rehearing En Banc was filed in the said Court of Appeals in accordance with and within the time limited by the Federal Rules of Appellate Procedure, having been filed on July 16, 1969.

Petition for Rehearing En Banc is still pending and undisposed of by the said Court of Appeals. A copy of

said Petition for Rehearing En Banc is a part of this record in the Supreme Court and pertinent extracts therefrom have been attached as Exhibit A to the above Response filed herein by these Cross-Petitioners. Said Petition for Rehearing is made a part hereof by reference.

Jurisdiction of this Court is invoked pursuant to the provisions of Title 28 U.S.C. § 1254 (1).

3. Reservation of Rights

The Cross-Petitioners reserve their objections filed to the original Petition for Writ of Certiorari and to the Motion to Advance the same. This Cross-Petition for Writ of Certiorari is filed to protect the rights of Cross-Petitioners and to assure that if a Writ of Certiorari is issued it will bring the entire matter before this Court as distinguished from one amendment to one portion of the judgment of the Court of Appeals. It is also filed taking cognizance of the fact that the Petition for Rehearing En Banc is under consideration by the Court of Appeals of the Fifth Circuit and that should such Petition be overruled during the pendency of this proceeding, Rule 20 would become inapplicable as of that date. The Cross-Petitioners further reserve their objection to the original Petition for Writ of Certiorari on the ground that it attempts to obtain a review of an amendment to a judgment and not of the entire judgment. It can only be sustained if construed to be a Petition for Writ of Certiorari to review the judgment of July 3, 1969, as amended on July 25, 1969 and August 28, 1969.

4. Questions Presented for Review

(1) Is a freedom of choice plan a proper vehicle to set up and maintain schools conforming to all Constitutional guarantees, where such plan is properly formulated

complying with all requirements laid down by the courts, administered fairly and without discrimination, and which permits truly free and uninfluenced choice by students and their parents? If so, what are the vestiges of a dual system which must be eradicated in order to maintain a freedom of choice plan?

(2) Do the decisions of the Court of Appeals of the Fifth Circuit construing, implementing and broadening *Jefferson I* and *Jefferson II*, or any other decisions thereof applying Section 1 of the Fourteenth Amendment to the administration of public schools, conflict with the decisions of other Courts of Appeal on the same question?

(3) Does Section 1 of the Fourteenth Amendment require enforced integration of the public schools as distinguished from prohibiting enforced segregation thereof to the extent that any plan is unconstitutional under which there are schools composed of students of only the Negro race, *or* only a small fraction of Negroes are enrolled in formerly white schools, *or* there are schools with faculties composed chiefly of teachers of one race?

(4) Has the Court of Appeals of the Fifth Circuit in *Hinds County* and other cases announced by various panels applied Section 1 of the Fourteenth Amendment to the administration of public schools so that it has decided a Federal question in a way which conflicts with applicable decisions of this Court, or so as to determine important questions of Federal law which have not been, but should be, settled by this Court?

(5) Have the Cross-Petitioners been accorded due process of law or did the Court of Appeals of the Fifth Circuit err in reversing and remanding the consolidated cases in *Hinds County* without an opportunity for the

record to be considered, for full briefs to be filed, and for the Court to consider the differing local situations and differing attainments in the districts involved?

5. Constitutional Provisions and Statutes Involved.

The following are the Constitutional provisions and statutes involved with citation of the volume and page where they may be found in the official edition:

Fourteenth Amendment to the Constitution of the United States,

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CIVIL RIGHTS ACT OF 1964, SUBCHAPTER IV.
PUBLIC EDUCATION

Section 401(b) of the Civil Rights Act of 1964, being Pub.L. 88-352, Title IV, § 401, July 2, 1964, 78 Stat. 246, and appearing as Title 42, Section 2000c-(b), U.S.C.A.:

> "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

Section 410 of the Civil Rights Act of 1964, being Pub. L. 88-352, Title IV, § 410, July 2, 1964, 78 Stat. 249, and appearing as Title 42, Section 2000c-9, U.S.C.A.:

> Nothing in this subchapter shall prohibit classification and assignment for reasons other than race, color, religion, or national origin.

Section 407 of the Civil Rights Act of 1964, being Pub. L. 88-352, Title IV, § 408, July 2, 1964, 78 Stat. 249, appearing as Title 42, Section 2000c-6(a), U.S.C.A.:

> . . . provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.

CIVIL RIGHTS ACT OF 1964, SUBCHAPTER V. FEDERALLY ASSISTED PROGRAMS

Section 604 of the Civil Rights Act of 1964, being Pub.L. 88-352, Title VI, § 604, July 2, 1964, 78 Stat. 253, and appearing as Title 42, § 2000d-3, U.S.C.A.:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

CIVIL RIGHTS ACT OF 1964, SUBCHAPTER VI. EQUAL EMPLOYMENT OPPORTUNITIES

Section 702 of the Civil Rights Act of 1964, being Pub.L. 88-352, Title VII, § 702, July 2, 1964, 78 Stat. 255, and appearing as Title 42, Section 2000e-1, U.S.C.A.:

> This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities *or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.*

In addition to the above statutes directly applicable to these suits, the Congressional intent concerning these matters has been expressed repeatedly since 1964. An illustration thereof is Public Law 90-557, 82 Stat. 969, which included the current appropriations for the Departments of Health, Education and Welfare and Labor. The section relating to elementary and secondary education, containing the following clear prohibition is as follows:

> No part of the funds contained in this Act may be used to force bussing of students, abolishment of any school or to force any student attending any elementary or secondary school to attend a particular school against the choice of his or her parents or parent in order to overcome racial imbalance.

6. Preliminary Statement

Due to the limited time involved it has been impossible to obtain and file with the Clerk of this Court a transcript of the entire record of these nine consolidated cases, which the original Petitioners failed to do. However, for the purposes of this Response and Cross-Petition, we have filed under Rule 21.4 transcripts and other portions of the record originally made in the District Court necessary to give this Court a full understanding of the necessity of a full review of the entire record upon which the judgment of July 3, 1969, as amended, is based, which, upon appeal, be-

came a part of the record of the Court of Appeals. These portions of the record are illustrative of the facts proved in the District Court and involved in the judgment of the District Court dated May 16, 1969, and of the Court of Appeals rendered July 3, 1969.

We have chosen the transcript of proceedings in three typical cases:

(1) *John Barnhardt, et als.* v. *Meridian Separate School District, et als.*, Civil Action No. 1300. Meridian is the largest school district among the fourteen included in the nine suits now before this Court. See Note 1 on pages 2 and 3 of the Petition for a listing of these districts, in addition to the listing contained in the caption of this pleading.

(2) *Charles Killingsworth* v. *The Enterprise Consolidated School District*, Civil Action No. 1302, which is one of the smallest school districts now before this Court.

(3) *Roy Lee Harris, et als.* v. *Yazoo County Board of Education, Yazoo City Separate Municipal School District and Holly Bluff Line Consolidated School District*, Civil Action No. 1209. These districts are about the average size of those now before this Court.

(4) *United States* v. *Hinds County School Board, et als.*, Civil Action No. 4075. Under the consolidation of the twenty-five cases, the testimony of the educators and experts in the *Hinds County* case was adopted by and became a part of the record of the remaining twenty-four cases.

(5) We also discuss the facts appearing in the record of the United States District Court and the Court of Appeals for the Fifth Circuit in the suit of *United States* v. *Natchez Special Municipal School District, et als.* This

suit is not before this Court but it is typical of many of the other school districts not involved in the Petition for Writ of Certiorari. It is included because of the broad and inaccurate statements contained in the Petition for Writ of Certiorari. The testimony, the reports originally filed in the District Court and the other judicial proceedings therein are typical of the twenty-five consolidated cases. If this Petition for Writ of Certiorari is granted, we will more fully and completely give to this Court all facts and law necessary for a decision in this case.

7. Statement of Facts

Because of the necessity of considering the facts in the light of the decisions of this Court and the Courts of Appeal of the various Circuits, we will call the Court's attention to the facts which are pertinent upon this Cross-Petition for the Issuance of a Writ of Certiorari after discussing the applicable judicial decisions. See page 84e of this Cross-Petition.

8. Argument Amplifying the Reasons Relied Upon for Allowance of the Cross-Petition for Writ of Certiorari

(1) The school districts have followed their Constitutional duty as announced and as changed from year to year by the Supreme Court and the Court of Appeals of the Fifth Circuit. The districts are now characterized as "reluctant and recalcitrant" because total compulsory integration removing or substantially diminishing racial imbalance has not been already achieved "after 15 years"

"Line upon line, precept upon precept, here a little, there a little" has been the theme of the integration activists. They have said so often that the delay from 1954 to 1969 is solely caused by "reluctant and recalcitrant school

boards" that some of the courts have been persuaded to accept that allegation. Nothing could be further from the truth. This discussion will be limited to school districts within the Fifth Circuit for brevity and clarity.

The Court of Appeals of this Circuit first realized the enormous problems facing the administrators of schools in this Circuit, as well as in other Circuits. They carefully followed the admonition of the Supreme Court that the process of desegregation should be carried out "with all deliberate speed". The officials of the school districts conformed to these requirements, many beginning prior to the decisions mentioned below of February 9, 1961. One illustration is that discussed in this brief of the Meridian School District, which began its process leading to desegregation in the year 1954.

The present chaos and confusion which exists has arisen chiefly through the rendition of *Jefferson I* on December 29, 1966, its confirmation by the Court of Appeals en banc on March 29, 1967, writ of certiorari denied on October 9, 1967. This has been correctly characterized by the Court of Appeals of the Sixth Circuit in *Monroe* v. *Board of Commissioners of City of Jackson, Tennessee*, 380 F.2d 955, rendered July 21, 1967, as follows:

> We are asked to follow United States v. Jefferson County Board of Education, 372 F.2d 836 (CA 5, 1966), which seems to hold that the pre-Brown biracial states must obey a different rule than those which desegregated earlier or never did segregate. *This decision decrees a dramatic writ calling for mandatory* immediate integration. . . .
>
> However ugly and evil the biracial school systems appear in contemporary thinking, they were, as Jefferson, supra, concedes, de jure and were once found lawful in Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), and such was the law for 58 years

thereafter. *To apply a disparate rule because these early systems are now forbidden by Brown would be in the nature of imposing a judicial Bill of Attainder. Such proscriptions are forbidden to the legislatures of the states and the nation—U. S. Const., Art. I, Section 9, Clause 3 and Section 10, Clause 1.* Neither, in our view, would such decrees comport with our current views of equal treatment before the law. . . .

When the Court of Appeals of this Circuit in *Jefferson II* overruled eight cases decided by it over a long period of years, announced a dramatic and revolutionary writ contrary to the Constitutional principles announced by the other Circuits and those elucidated by this Court, the public school systems within this Circuit began a deterioration which can only be stopped by an examination by this Court of the decisions now destroying that system, followed by a clear statement of the rules which must be followed and the results obtained in order that the students in our public schools and their parents may receive equal treatment under the law and may be truly free.

It is hard to realize that only two school years have elapsed since *Jefferson II*, being the school years 1967-1968 and 1968-1969. In fact, the school districts here and hundreds of other school districts throughout the Fifth Circuit had accepted the meaning ascribed to "total desegregation" by the Court of Appeals of this Circuit, i.e., the extension of a true, reasonable and proper plan of freedom of choice to every grade in the school system. This had been varied, as time passed. Action required was to change from a plan of one-grade-a-year to a plan of two-grades-a-year, then a plan of four-grades-a-year, and then full extension of freedom of choice to all grades with the school year beginning in 1967. At no time prior to March 29, 1967 (made certain on October 9, 1967) had these school officials been told by their Court of Appeals that a plan which "promises realisti-

cally to work now" and an extension of "total desegregation" to their schools meant anything more than removal of the true vestiges of a dual school system and the formulation and implementation of a true freedom of choice plan.

The Secretary of Health, Education and Welfare has stated his opinion that if the timetable set up in the judgment of the Court of Appeals of the Fifth Circuit dated July 3, 1969, were to be enforced it would:

> . . . produce chaos, confusion and catastrophic educational setback to the 135,700 children, black and white alike, who must look to the 222 schools of these 33 school districts for their only available educational opportunity.

This belief is supported by the chaos and confusion now existing in the hundreds of school districts throughout the Fifth Circuit. That condition has resulted from repeated and unheralded changes made by the Court of Appeals of this Circuit in its "guidelines" and "directives", which disrupted the educational process. Indeed, Bedlam and the Tower of Babel[2] were each a "Sea of Tranquility" compared to the present state of our public schools.

Until *Jefferson I* was handed down on December 29, 1966, was confirmed by *Jefferson II* upon a rehearing en banc on March 29, 1967, with certiorari denied October 9, 1967, the school districts had been working under the commands of *Brown I, Brown II, Cooper* and their progeny. The very first sentence under the "STATEMENT" in the Petition for Writ of Certiorari is in direct conflict with the facts shown by this record. This is also true con-

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2. Bedlam was a "madhouse" erected in the edge of London in the early sixteenth century, from which the use of the present term has been derived. All are familiar with the Biblical account of what occurred during the erection of the Tower of Babel.

cerning the statement at the bottom of page 3 and top of page 4, and the statement on page 17 of the Petition for Writ. We will not attempt to detail or refute each statement, most of which are based upon generalized opinions of the writer. However, for the convenience of the Court, we quote these three particular statements:

> These cases test how much longer Negro schoolchildren in 14 substantially segregated school districts in Mississippi will have to wait to exercise their right to a desegregated education decreed by this Court more than 15 years ago in Brown v. Board of Education. . . .
>
> These freedom of choice plans did not work to disestablish the dual school system. Indeed, the token results achieved by these plans were even less than the results held insufficient in Green. . . .
>
> Delays in the past have served to embolden the recalcitrant, discourage voluntary compliance and nourish new schemes for evasion. Fifteen years of history teach us that every possibility for delay, however circumscribed, will be treated as an invitation for ready ingenuity to exploit.

These statements necessarily assume that "all deliberate speed" was not of judicial origin. As demonstrated below, the Court of Appeals held as late as 1965 and 1966 that extension of "freedom of choice" at the rate of four grades a year resulted in the school district being "fully desegregated". The record shows that freedom of choice has already been extended to every grade in every school district here.

We briefly trace the development of the rules laid down by the Court of Appeals of the Fifth Circuit under *Brown I, Brown II, Cooper, Goss, Watson, Green, Monroe, Raney, Carr* and other cases. It is of vital importance to remember that "hindsight is better than foresight". The

Petitioners are urging that there be imposed "a judicial Bill of Attainder" against school officials throughout the nation and particularly within this Circuit.

Looking back over the years, we see that the overruling of *Plessy* v. *Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), and the myriad of supporting cases has been broadened rather than narrowed. However, the Court will take judicial notice of the fact that when there is a revoluntionary departure from Constitutional construction which had been accepted for many generations, it is reasonable for all citizens to await the gradual development of decisional law in order to determine the exact and true meaning of the broad principles originally announced.

On *February 9, 1961,* after *Brown I, Brown II, Cooper* and succeeding cases clarified the new Constitutional principles, a group of cases was decided by the Court of Appeals of the Fifth Circuit. These cases were *St. Helena Parish School Board, et al.* v. *Hall,* 287 F.2d 376; *East Baton Rouge Parish School Board* v. *Davis,* 287 F.2d 380; *Louisiana State Board of Education, et al.* v. *Allen, et al.,* 287 F.2d 32; and *Louisiana State Board of Education, et al.* v. *Angel, et al.,* 287 F.2d 33. These cases enjoined the school boards from requiring racial segregation in public schools but did not set up any time limit or schedule of "desegregation".

Then on *July 24, 1962,* the Fifth Circuit handed down its decision in *Augustus* v. *Board of Public Instruction of Escambia County, Florida,* 306 F.2d 862. In that decision the Court found that the *Board must amend its plan to provide for one grade per year desegregation.*

Again in *August of 1962* the Court of Appeals of the Fifth Circuit in *Bush* v. *Orleans Parish School Board, et al.,*

308 F.2d 491, held that a policy of desegregation of one grade per year was proper and Constitutionally sufficient. The District Court had earlier withdrawn an order for desegregation of the first six grades by the fall of 1962. The Board presented a long-range plan providing for a grade a year desegregation and for redistricting of attendance areas in future years. This long-range plan was approved by the Court.

Almost one year later in June, 1963, in *Calhoun, et al.* v. *Latimer, et al.,* 321 F.2d 302, the Court of Appeals found that a desegregation plan earlier approved providing for one grade a year desegregation was operating in good faith and with substantial progress and that school officials were following the letter and the spirit of the plan. The Court found that plaintiff's objection to the feature of the plan which allowed the board to continue to assign pupils to the same school they formerly attended but with the right to transfer given those in the desegregated grades was unjustified. However, the Supreme Court reversed on May 25, 1964, 377 U.S. 263, 12 L.Ed.2d 288, 84 S.Ct. 1235, without fixing the timing of further desegregation.

On January 10, 1964, the Fifth Circuit decided *Board of Public Instruction of Duval County, Florida, et al.* v. *Braxton,* 326 F.2d 628. Here the Court *approved a grade a year desegregation plan* beginning with the first grade for the 1962-63 school year to be achieved by the use of a single geographical school district in the desegregated grades by permitting students in those grades to apply for admission to the school of their choice. *This plan was approved but the Court noted that it doubted that it would be necessary for twelve years to pass to accomplish desegregation and noted that desegregation plans could be speeded up.* The Court said that problems related to ad-

ministration arising from the physical condition of the school plants, school transportation system and personnel could be considered.

Three months later, on *March 20, 1964,* the Fifth Circuit decided the case of *Gaines* v. *Daugherty County Board of Education, et al.,* 329 F.2d 823. This case modified a plan submitted by the Board of Education by requiring the first two grades and the vocational schools to be desegregated in the first year. The Court postponed a decision on whether or not one grade per year desegregation was adequate pending a decision of the United States Supreme Court.

On *June 18, 1964,* the Fifth Circuit handed down its decision in *Armstrong* v. *Board of Education of the City of Birmingham,* 333 F.2d 47, where the Court required desegregation to proceed *at the rate of two grades per year* so as to accomplish complete desegregation within six years, i.e., by 1970.

Then on *July 31, 1964,* the Fifth Circuit again took up the case of *Gaines* v. *Daugherty County Board of Education*; the opinion following this consideration is reported in 334 F.2d 983. As a result of the *Calhoun* decision by the Supreme Court, the Fifth Circuit directed the District Court to enter an order in *Gaines* requiring immediate *total desegregation* of vocational schools by giving any pupil the choice of attending either the formerly Negro or formerly white vocational school. Freedom of choice for the fall of 1964 for all children in the first, second and twelfth grades and desegregation in the same manner of *two additional grades each year above the second grade and one additional grade below the twelfth so that total desegregation would be accomplished in four years.*

During the years 1964, 1965, 1966 and 1967, the school officials throughout the Fifth Circuit were looking to the

Court of Appeals for guidance and direction as to those actions which should be taken by them in order to be in obedience to Constitutional principles. Through hindsight, the Civil Rights activists are attempting to lay all blame upon these officials for not having not only accomplished desegregation as now required by the decisions of the courts, but also for not having brought about many years ago total integration or mixing of students. It is forgotten that the districts here, in common with many other school districts throughout the Fifth Circuit, were administering their schools in accordance with the principles announced by the Court of Appeals of this Circuit. This is illustrated by *Singleton v. Jackson Municipal Separate School District*, 348 F.2d 729, which was decided by the Court on June 22, 1965. This Circuit, speaking through Judge Wisdom, noted that on "*July 15, 1964*, the Board filed a grade-a-year segregation plan offering 'freedom of choice' type assignments to pupils entering the first grade in September, 1964". This was the first desegregation undertaken by the School Board. The significant portion of the opinion of the Court of Appeals which is applicable to many of the districts here is as follows:

> The United States Office of Education, Department of Health, Education and Welfare, has fixed minimum standards to be used in determining the qualifications for schools applying for federal financial aid. "The fall of 1967 is set as the target date for the extension of desegregation to all grades of school systems not fully desegregated in 1965-1966 as a qualification for Federal financial assistance"; a good faith start requires designation of at least four grades for the 1965-1966 school year. . . .
>
> If Selma, Alabama, can commence with desegregation of four grades for 1965-1966, Jackson, Mississippi, can at least catch up. And indeed in all but the most exceptional cases, all school districts commencing desegregation in fall 1965 should be expected to do as well.

Again, *on August 16, 1966,* there was before the Court of Appeals the question of action required under the Constitution by a school board. This was in the case of *Davis v. Board of School Commissioners of Mobile County,* 364 F.2d 896. Under this case, as well as *Singleton,* the school districts here were in compliance with the principles announced by the Court of Appeals of this Circuit and are not subject to being penalized because they could not foresee the complete reversal of principles and of policies which would take place on March 29, 1967, when *Jefferson II* was pronounced. In *Davis,* the pertinent provisions of the opinion which was issued through Chief Judge Tuttle are as follows:

> The plan was to have application in the school year 1963-64 to the twelfth grade in the City of Mobile only, in the school year 1964-65 it was to have application to the eleventh and twelfth grades in all schools in Mobile County and to the first and tenth grades in the City of Mobile schools. In 1965-66 it was to have application to grades one, two, nine, ten, eleven and twelve of all schools of Mobile County. In 1966-67, grades three and eight were to be added, in 1967-68, grades four and seven were to be added, in 1968-69 grade five was to be added, and in 1969-70 it became applicable to grade six. . . .
>
> In addition, two further modifications of the Mobile plan must be made. *The first is that the time must be shortened in such manner that all grades will be fully desegregated by the beginning of school in the fall of 1967,* the target date announced in the H.E.W. regulations. There is nothing on the record before us that demonstrates the need for any additional time under the formula announced in the Brown decision.

Criticism of past actions has not been confined to the period from 1964 to 1967. In fact, it still continues to be applied to actions taken by boards of education prior to

Brown I. The tendency to place burdens upon public officials for past actions which had been judicially declared to be lawful at that time, has unfortunately been followed by some of our courts and is now urged by the petitioners here. Judge J. P. Coleman of the Court of Appeals of the Fifth Circuit well said in his specially concurring opinion in *Jefferson II*:

> Prior to 1954, racially separate, if equal, schools had not been condemned as unconstitutional. *One is not to be punished or harassed for an act which was lawful when it was done.* Indeed, such condemnation in this instance would inferentially include some of the most highly respected Judges who ever graced the Supreme Court. They had opportunities to condemn the system but, in the exercise of perfect judicial integrity, did not. As I understand it, an Omnipotent God does not change yesterday when it is past and gone. Certainly this Court cannot do it. . . .
>
> *I further believe that whatever the Fourteenth Amendment requires of any State it requires of all States.* If we are requiring something here in the enforcement of Fourteenth Amendment rights that should not be required of all fifty States then we have exceeded our authority and we have misapplied the Constitution.

Judge Coleman's position is clearly and emphatically supported by the United States Court of Appeals of the Sixth Circuit in *Monroe* v. *Board of Commissioners, City of Jackson, Tennessee,* 380 F.2d 955, decided on July 21, 1967. That Court aligned itself with other Circuits in direct conflict with the Court of Appeals of the Fifth Circuit, as follows:

> The District Judge's opinion discusses pertinent authorities and concludes that *the Fourteenth Amendment did not command compulsory integration of all of the schools regardless of an honestly composed unitary neighborhood system and a freedom of choice plan.*

We agree with his conclusion. . . . He concluded *"We read Brown as prohibiting only enforced segregation."* 369 F.2d at 60. We are at once aware that we were there dealing with the Cincinnati schools which had been desegregated long before Brown, whereas *we consider here Tennessee schools desegregated only after and in obedience to Brown. We are not persuaded,* however, that we should devise a mathematical rule that will *impose a different and more stringent duty upon states which, prior to Brown, maintained a de jure biracial school system, than upon those in which the racial imbalance in its schools has come about from so-called de facto segregation*—this to be true even though the current problem be the same in each state. . . .

In Mapp v. Board of Education, 373 F.2d 75, 78 (CA 6, 1967), Judge Weick said,

> "To the extent that plaintiffs' contention is based on the assumption that the School Board is under a constitutional duty to balance the races in the school system in conformity with some mathematical formula, it is in conflict with our recent decision in Deal v. Cincinnati Board of Education, 369 F.2d 55 (6th Cir. 1966). . . ."

But to the extent that United States v. Jefferson County Board of Education, and the decisions reviewed therein, are factually analogous and express a rule of law contrary to our view herein and in Deal, we respectfully decline to follow them.

(2) A freedom of choice plan is the proper vehicle to set up and maintain schools conforming to all Constitutional guarantees and when such plan and the school system are administered fairly and without discrimination, all vestiges of a dual discriminatory racial school system are eradicated

A careful study of *Green, Monroe* and *Raney* reveals that these cases are not inconsistent with *Brown I, Brown*

II, Cooper, Goss and preceding decisions of this Court. School systems from three different states lying within three different Circuits were considered. The Court of Appeals of the Fifth Circuit has seized upon three of the many elements and held that the presence of any one of them will render a freedom of choice plan unconstitutional. This is a narrow view. A careful study (of *Green, Raney* and *Monroe*) reveals that the clauses and phrases which were utilized in reviewing these systems reflect the innumerable facets of school administration.

The elements elucidated in these cases included:

1. Every facet of school operations;
2. Faculty, staff and student body;
3. Transportation and construction of new buildings;
4. Extracurricular activities and facilities;
5. Majority to minority transfer;
6. Method of exercising the freedom of choice;
7. Assignment of students who did not exercise the freedom of choice;
8. Whether or not the "public school facilities for Negro pupils (were) inferior to those provided for white pupils";
9. Operation of the freedom of choice plan "in a constitutionally permissible fashion";
10. "All aspects of school life including faculties and staffs";
11. Whether "the board had indeed administered the plan in a discriminatory fashion";
12. The comparative treatment of students attempting "to transfer from their all-Negro zone schools to schools where white students were in the majority";

13. The comparative treatment of "white students seeking transfers from Negro schools to white schools";

14. Whether "the transfer (provision) lends itself to perpetuation of segregation".

Within the broad statements of *Green*, *Monroe* and *Raney* fall the following additional phases of school administration:

15. Athletic activities within the schools;

16. Parent-teacher associations;

17. Faculty and staff meetings within schools and of faculties and staffs of the various schools at the elementary, junior high school and high school levels;

18. School-sponsored visitation of student body officers and student committees;

19. In-service training of teachers and staff to assist in the desegregation process;

20. Participation by students in various types of student organizations.

It is clear that the following do not constitute vestiges of a de jure racially discriminatory dual school system:

(1) All-Negro schools and all-white schools, identifiable as being *attended* by students of only one race or by students predominantly of one race.

(2) Schools being *served* by faculty and staff composed of members of one race or composed predominantly of members of one race.

(3) Schools in which the number of students of the two races do not materially vary from year to year, i.e., in which statistics do not demonstrate that the number of Negro students is increasing in a school attended predom-

inantly by white students or in which Negro teachers are not increasing where the faculty is composed predominantly of members of the white race.

(4) Statistical information may be considered in connection with evidence concerning all other phases of the administration of schools. However, statistics cannot be the sole or major basis of a judicial determination as to whether or not the vestiges of a dual school system have been eliminated.

This Court in *Green, Raney* and *Monroe,* clearly enunciated the basic principles that the Constitution requires all districts to be operated on a unitary, nonracial, nondiscriminatory basis and that, in districts having a history of *de jure* segregation, the school boards operating such school systems were required to effectuate a transition to a racially nondiscriminatory school system. In this context, this Court stated that steps must be taken in which racial discrimination would be eliminated, root and branch. These decisions, it is submitted, clearly establish that each school district of the nation must be operated as a unitary, nonracial, nondiscriminatory school district and that, in districts that have a history of *de jure* segregation, the trustees of the school district have the affirmative duty of "eradicating the last vestiges of the dual system". The confusion and misunderstanding now rampant in this Circuit grows out of the interpretation and application of these basic concepts. It is essential that this confusion be eliminated. Literally hundreds of thousands of children are involved, as well as the entire educational system. The interpretation and application of these basic concepts, it is submitted, is probably the most important question facing the courts of this nation today. Involved in the answer to this question is whether the schools will be operated, in their day to day operations, by a federal department under the supervision and guidance of the federal judiciary, or

whether the officials of the districts can, through qualified educators, operate the schools in conformity with the concepts of the applicable provisions of the Constitution as defined by the courts.

The two concepts are as follows: (A) a unitary, nonracial, nondiscriminatory school system, and (B) the vestiges of a dual system which must be removed by the trustees of the school districts. We will briefly discuss these two concepts with the thought in mind of at least demonstrating the necessity for a clearcut, understandable judicial definition—a definition that is based upon constitutional principles and not upon the changing guidelines of a department of the executive branch of our government dealing with the expenditure of funds.

What is a unitary, nonracial, nondiscriminatory school system?

It is submitted that the answer to this question is not too difficult. It is a school system which is open and free to all pupils and in which race is not a factor. In fact, if it is to be "nonracial", then it is a contradiction on its face to take action that is motivated by the race of the pupil. One panel of the Fifth Circuit has given a definition in *Broussard*, as follows:

> ". . . it would appear that an 'integrated, unitary school system' is provided where every school is open to every child. It affords 'educational opportunities on equal terms to all.' That is the obligation of the Board."

This Court in *Jefferson II* stated as follows:

> "The governmental objective of this conversion is—educational opportunities on equal terms to all."

It is submitted that this concept is clear, can be followed and implemented by school trustees of all school dis-

tricts. The school districts throughout the nation, whether they have a history of *de jure, de facto,* or no segregation at all, must be operated on a unitary, nonracial basis. This is easily understood and can be easily implemented by the trustees that are acting in good faith. If the trustees are not acting in good faith, such can be easily demonstrated to and corrected by the district court and will not require that the federal courts become involved in the day to day operations of the schools in the school districts.

It is submitted that, if this Court expressly adopts the definition of a unitary, nonracial, nondiscriminatory school system as succinctly set out in *Broussard,* which, with deference, it ought to do, then the only problem which would remain would be to properly deal with the second concept.

What are the vestiges of the dual system which must be eradicated by the trustees of the school districts?

Quite frankly, it would also appear that the answer to this question should not be too difficult. It is submitted, however, that some of the recent decisions of various panels of this Circuit have made requirements of school districts that are *not* in keeping with the obligation to remove the vestiges of the dual system and have thereby created confusion and consternation concerning the meaning of this obligation.

Our discussion here will be based upon the assumption that we are correct in that the obligation of the trustees of the school districts located in formerly *de jure* segregated states is the affirmative duty to eradicate the last vestiges of the dual system. If this be true, then these vestiges must be identified and eradicated. It is not enough to operate a unitary system at this time. These trustees must go further and eradicate or eliminate any vestiges of the dual system.

Illustrative of the points we are attempting to make here is the decision by a panel of this Circuit in *Adams*. The panel in *Adams*, with no record before it, and with no opportunity being offered counsel to be heard, made a specific finding that an all-Negro school was a vestige of the dual system and must be eradicated in all districts in the Fifth Circuit. Since that time, the language in *Adams* has been quoted by several panels of this Circuit. Insofar as we know, however, no case has ever been presented to this Court which contained facts which would support a finding that this is a vestige of a dual system. A study of the history of litigation in this field indicates that the "racial statistics" approach as a measuring device for determining whether the last vestiges of the dual system have been removed originated with the office of Health, Education and Welfare. That office promulgated guidelines which contained statistical requirements to be used in determining whether funds would be made available to the various school districts. It is submitted that this approach has been adopted by some of the panels in this Circuit as a constitutional requirement, when, as a matter of fact, the office of Health, Education and Welfare has no authority to make constitutional interpretations that are binding on the courts and that office had no hearing or proof upon which to reach such a conclusion in the first place. Certainly the decisions of this Court should be supported by proof.

The situation is, therefore, that we have Courts of Appeal for different circuits reaching opposite conclusions based on judicial notice and without the benefit of any actual proof in the record on which these conclusions could be based.

In these proceedings now before this Court, there is proof, which was uncontradicted, that the existence of all-

Negro schools is *not* a vestige of the dual system. In addition, there is before this Court statistical information taken from the official records of the office of Health, Education and Welfare showing the racial composition of schools in the one hundred largest school districts in this nation. Most of these districts have never had a dual system. These statistics show, and we submit this is conclusive, that all-white and all-Negro schools exist in every school district where there is a large percentage of both white and Negro pupils. These statistics show, beyond question, that all-white and all-Negro schools do exist in school districts that have never had a dual system. As a matter of fact, of the 12,497 schools in these one hundred school districts, assuming that a school with less than one percent of the minority race is an all-Negro or all-white school, 6,137 are either all-white or all-Negro. In other words, over forty-eight percent of the schools in the one hundred largest school districts in this nation are either all-white or all-Negro. Most of these districts are in areas that have never had a dual system. We submit, therefore, that for this Court to adjudicate that the existence of an all-Negro or an all-white school is, in and of itself, a vestige of the dual system is without support of any proof, is incorrect, and is clearly erroneous.

The language of the Court in *Jefferson*, sitting in banc, was that there was to be "no Negro schools and no white schools—just schools". This language of this Court in its in banc decision is in accord with the obligation of the school trustees to operate a unitary school system. The schools are not to be Negro schools nor are they to be white schools. They are to be just schools. This does not, however, mean that there must be both white and Negro pupils in attendance at each and every school. Since the existence of schools at which only Negroes attend, or the existence of schools at which only whites attend is *not*,

in and of itself, a vestige of the dual system, then there is no constitutional basis on which the courts may or can require their elimination or eradication as being a vestige of the dual system.

In addition to the foregoing, there is in this record testimony of experts which demonstrates conclusively that (1) all-Negro or all-white schools are not vestiges of the dual system and (2) a definite or specific amount of integration of the races in the schools is not an indication or even proof that the schools are operated on a unitary basis with the vestiges of the dual system eliminated or eradicated—at best, it is only peripherally relevant to the issues.

This evidence also stands uncontradicted and will be discussed and presented in full, if this petition is granted and this Court hears these cases.

What we have stated concerning pupils is equally applicable to faculties. The proof is that an all-Negro faculty or an all-white faculty is not, in and by itself, a vestige of the dual system and does not destroy the unitary nature of the school system.

Other illustrations could be given. It is submitted, however, that the foregoing discussion points up the absolute necessity of this Court determining the issues presented by these cases.

Much confusion has arisen from the various interpretations of the duty of school boards articulated in *Green*:

> School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly *charged with the affirmative duty* to take whatever steps might be necessary to *convert to a unitary system in which racial discrimination would be eliminated root and branch.* See Cooper v. Aaron, supra, at 7, 3 L.Ed.2d at 10; Bradley v. School Board, 382 U.S. 103, 15 L.Ed.2d 187, 86 S.Ct. 224; cf. Watson v. City of

Memphis, 373 U.S. 526, 10 L.Ed.2d 529, 83 S.Ct. 1314. The constitutional rights of Negro school children articulated in Brown I permit no less than this; *and it was to this end that Brown II commanded school boards to bend their efforts. . . .* Note. "We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible *eliminate the discriminatory effects of the past as well as bar like discrimination in the future.*" Louisiana v. United States, 380 U.S. 145, 154, 13 L.Ed.2d 709, 715, 85 S.Ct. 817.

Heretofore we have quoted the words used by the Supreme Court of the United States to describe constitutionally acceptable school systems and to delineate constitutional duties of school officials. Although the passage of time now requires more realistic results and more comprehensive steps without further delay, the basic constitutional principles originally announced in *Brown I* have not been changed in the succeeding pronouncements by the Supreme Court up to and including *Carr*.

The Court of Appeals of the Sixth Circuit in *Goss* construed the meaning of *Green* and succeeding cases. In doing so it said:

> In *Green* the Court said school boards must adopt plans which "promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." 391 U.S. at 442, 88 S.Ct. at 1696. The Court further said that it would be their duty "to convert to *a unitary system in which racial discrimination would be eliminated root and branch.*" 391 U.S. at 437-438, 88 S.Ct. at 1694. We are not sure that we clearly understand the precise intendment of the phrase "a unitary system in which racial discrimination would be eliminated," *but express our belief that Knoxville has a unitary system designed to eliminate racial discrimination.*

The unitary, nondiscriminatory, nonracial school system in Knoxville was found by the Court to contain five all-Negro schools and 29 schools in which the teaching staffs were composed exclusively either by members of the Negro race or members of the white race.

In *Goss* the Court chose between the constitutional principles enunciated in *Green*, *Raney* and *Monroe* as against those announced by this Circuit by the panels of the Court in *Adams*, *Duval*, *Graves* and *Greenwood*, which had varied and extended *Jefferson II*. It denied the contentions of the plaintiffs (identical with those which have now been embraced by panels of this Circuit) as follows:

> Presented to us upon plaintiffs' appeal are the following statements of questions involved:
>
> I. Whether the Knoxville School System is completely desegregated in spite of the fact that the Negro schools under dual operation remain identifiable as Negro schools and are attended almost exclusively by Negro students?
>
> II. Whether the Knoxville School System should have been ordered to pair identifiable Negro schools which could be paired, locate new construction to help eliminate identifiable Negro schools, and take other affirmative action to disestablish segregation?
>
> Preliminarily answering question I, it will be sufficient to say that the fact that there are in Knoxville some *schools which are attended exclusively or predominantly by Negroes does not by itself establish that the defendant Board of Education is violating the constitutional rights of the school children of Knoxville.* Deal v. Cincinnati Bd. of Education, 369 F.2d 55 (6th Cir. 1966), cert. denied, 389 U.S. 847, 88 S.Ct. 39, 19 L.Ed.2d 114 (1967); Mapp v. Bd. of Education, 373 F.2d 75, 78 (6th Cir. 1966), cert. denied, 389 U.S. 847, 88

S.Ct. 39, 19 L.Ed.2d 114 (1967). *Neither does the fact that the faculties of some of the schools are exclusively Negro prove, by itself, violation of Brown.*

Four months later the Court of Appeals of the Sixth Circuit had before it *Monroe* v. *Board of Commissioners of the City of Jackson, Tennessee*, 380 F.2d 955, which was decided July 21, 1967. This involved formerly racially segregated de jure school systems. Because of its significance here, its consideration of *Jefferson I* and *Jefferson II* and its express repudiation of the construction thereof later adopted by panels of this Court, we quote at length from such decision:

> Appellants argue that the courts must now, by reconsidering the implications of the Brown v. Board of Education decisions in 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) and 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955), and upon their own evaluation of the commands of the Fourteenth Amendment, require school authorities to take affirmative steps to eradicate that racial imbalance in their schools which is the product of the residential pattern of the Negro and white neighborhoods. The District Judge's opinion discusses pertinent authorities and concludes that *the Fourteenth Amendment did not command compulsory integration of all of the schools regardless of an honestly composed unitary neighborhood system and a freedom of choice plan. We agree with his conclusion.* We have so recently expressed our like view in Deal et al. v. Cincinnati Board of Education, 369 F.2d 55 (CA 6; 1966), petition for cert. filed, 35 LW 3394 (U.S. May 5, 1967) (No. 1358), that we will not here repeat Chief Judge Weick's careful exposition of the relevant law of this and other circuits. He concluded "*We read Brown as prohibiting only enforced segregation.*" 369 F.2d at 60. We are at once aware that we were there dealing with the Cincinnati schools which had been desegregated long before Brown, whereas *we consider here Tennessee schools desegregated only after and in*

obedience to Brown. We are not persuaded, however, that we should devise a mathematical rule that will *impose a different and more stringent duty upon states which, prior to Brown, maintained a de jure biracial school system, than upon those in which the racial imbalance in its schools has come about from so-called de facto segregation*—this to be true even though the current problem be the same in each state.

We are asked to follow United States v. Jefferson County Board of Education, 372 F.2d 836 (CA 5, 1966), which seems to hold that the pre-Brown biracial states must obey a different rule than those which desegregated earlier or never did segregate. . . . In Mapp v. Board of Education, 373 F.2d 75, 78 (CA 6, 1967), Judge Weick said,

> "To the extent that plaintiffs' contention is based on the assumption that the School Board is under a constitutional duty to balance the races in the school system in conformity with some mathematical formula, it is in conflict with our recent decision in Deal v. Cincinnati Board of Education, 369 F.2d 55 (6th Cir. 1966)."

However ugly and evil the biracial school systems appear in contemporary thinking, they were, as *Jefferson*, supra, concedes, de jure and were once found lawful in Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), and such was the law for 58 years thereafter. *To apply a disparate rule because these early systems are now forbidden by Brown would be in the nature of imposing a judicial Bill of Attainder.* Such proscriptions are forbidden to the legislatures of the states and the nation—U.S. Const. Art. I, Section 9, Clause 3 and Section 10, Clause 1. *Neither, in our view, would such decrees comport with our current views of equal treatment before the law. . . . But to the extent that United States v. Jefferson County Board of Education, and the decisions reviewed therein,* are factually analogous and express a rule of law contrary to our view herein and in *Deal, we respectfully decline to follow them.*

A writ of certiorari was granted by the Supreme Court in this case and the decision appears as *Monroe*. The sole issue in that case was the constitutionality of a "free transfer" provision in the plan of desegregation. When the same suit again came before the Court of Appeals of the Sixth Circuit on February 10, 1969, as *Goss* the Court construed the holding of the Supreme Court in *Monroe* and upheld the above rule set forth in Judge Coleman's specially concurring opinion:

> In Monroe v. Bd. of Commissioners, 380 F.2d 955, 159 (6th Cir. 1967), we expressed our view that the end product of obedience to Brown I and II *need not be different in the southern states, where there had been de jure segregation, from that in northern states in which de facto discrimination was a fortuity. Our observations in that regard were not found invalid by the Supreme Court's opinion reversing our Monroe decision.* See Monroe v. Board of Commissioners, 391 U.S. 450, 88 S.Ct. 1700, 20 L.Ed.2d 733 (1968).

When *Cooper* again reached the Court of Appeals of the Eighth Circuit the opinion was rendered as *Clark v. Board of Education of Little Rock School District*, 369 F.2d 661, decided December 15, 1966, rehearing denied, 374 F.2d 569. The Court delineated a school system and its operation which falls within the constitutional mandate of the Supreme Court as follows:

> The Constitution prohibits segregation of the races, the operation of a school system with dual attendance zones based upon race, and assignment of students on the basis of race to particular schools. If all of the students are, in fact, given a free and unhindered choice of schools, which is honored by the school board, it cannot be said that the state is segregating the races, operating a school with dual attendance areas or considering race in the assignment of students to their classrooms. We find no unlawful discrimination in the giving of students a free choice of schools.

The school system of Little Rock had been a dual segregated school system. Hence, the decision of the Eighth Circuit in *Clark* and that of the Sixth Circuit in *Goss* (both considering formerly de jure segregated systems) are in direct conflict with *Hinds County*.

A classic definition of a constitutionally permissible freedom of choice plan is that used by Judge Godbold in clarifying the terms contained in his dissenting opinion to *Jefferson II* as follows:

> Throughout this opinion "freedom of choice" and "free choice" refer to a plan validly set up, properly administered, and with choices freely exercised without external pressures, so that the plan itself (as opposed to the statistical results produced by exercised choices) is in all respects constitutionally acceptable.

There is no difference between the ultimate constitutional goal of school authorities in northern and southern states, those administering de facto systems as compared to those administering formlery de jure systems. The difference lies in the necessity of affirmative action to remove *the vestiges of the dual school system*.

The rule applied in *Clark* to the Little Rock school system is certainly applicable to the fourteen districts here:

> Though the Board has a positive dufy to initiate a plan of desegregation, the constitutionality of that plan does not necessarily depend upon favorable statistics indicating positive integration of the races. . . . The system is not subject to constitutional objections simply because large segments of whites and Negroes choose to continue attending their familiar schools. It is true that statistics on actual integration may tend to prove that an otherwise constitutional system is not being constitutionally operated. However, these statistics certainly do not conclusively prove the unconstitutionality of the system itself. . . .

> In short, the Constitution does not require a school system to force a mixing of the races in school according to some predetermined mathematical formula. Therefore, the mere presence of statistics indicating absence of total integration does not render an otherwise proper plan unconstitutional.

The initial step to determine what are vestiges of a racially discriminatory dual school system (in which separation of the races has been de jure) as distinguished from racially nondiscriminatory unitary school systems (in which separation of the races has been de facto) is to eliminate those elements common to both.

In *Hinds County* educational experts of unimpeached ability, training and experience testified, without contradiction, that all-Negro and all-white schools occur throughout the United States wherever there are sufficient numbers of Negro students to bring this result through neighborhood patterns or natural desires of students and their parents. This evidence also demonstrated that any specific amount of integration or change of percentages of integration of the races in schools does not constitute a material element in determining whether a school system is operated on a racially discriminatory basis or is operated as a nonracial, nondiscriminatory unitary system, such matters being only peripherally relevant to such issue.

Compilations before this Circuit were assembled from the statistical information filed with the Department of Health, Education and Welfare and show the racial composition of schools in the one hundred largest school districts in this nation as of October 15, 1968. They were filed by school districts under the requirements of Title VI of the Civil Rights Act of 1964 and are upon Civil Rights Forms OS CR 102-1 and OS CR 101. Most of these districts have never had a dual system.

Assuming that a school with less than one percent of the minority race is an all-white or all-Negro school, of the 12,497 schools in the one hundred largest school districts in the United States 6,137 schools are ether all-white or all-Negro. Thus, more than forty-eight percent of the schools in these districts are either all-white or all-Negro. It is also found that in districts having as much as twenty percent or more Negro student enrollment, only one district does not have within it all-Negro schools. This is the Rochester, New York, Monroe County School District. In the consolidated cases at bar only one of the thirty districts has less than twenty percent Negro student enrollment. These facts cannot be a "vestige of the dual system of schools" but resulted from the natural process of education in a unitary, non-racial school system:

District	Total Schools in Dist.	Desegregated Schools	Schools of One Race	All-Negro Schools
Chicago Public Schools, Chicago, Ill.	610	218	392	208
Indianapolis Public Schs., Indiana	119	67	52	17
Des Moines Community Schs., Iowa	81	45	36	—
Boston School Dept., Massachusetts	196	140	56	11
Detroit Public Schools, Michigan	302	204	98	67
Special School Dist. No. 1, Minneapolis, Minn.	98	56	42	—
St. Louis City Sch. Dist., Mo.	164	50	114	83
Kansas City School Dist., Mo.	99	56	43	19
Newark Public Schools Newark, N. J.	80	53	27	27
Oklahoma City Public Sch. Dist., I-89, Okla.	115	44	71	15
Dallas Indep. Sch. Dist., Texas	173	56	117	26
Los Angeles School Dist., Calif.	591	232	359	65
Sch. Dist. No. 1, City & Co. of Denver, Colo.	116	62	54	3
District of Columbia Public Schools	188	74	114	114
Gary Community Schools, Gary, Ind.	45	20	25	21
Cleveland, Ohio, Cuyahoga Co.	180	65	115	57
New York City Public Schs. N.Y., N.Y.	853	695	158	113
Houston Indep. Schools, Houston, Texas	225	86	139	61
School Dist. of Philadelphia, Pa.	278	191	87	63

Broussard approved the Houston Independent School District as being in compliance with constitutional requirements under a freedom of choice plan. According to its official report as of October 15, 1968, there then remained sixty-one all-Negro schools, seventy-eight all-white schools, and there were eighty-six desegregated schools.

(3) The construction by the Court of Appeals of the Fifth Circuit of the application of Section 1 of the Fourteenth Amendment to public schools, announced in Hinds County and other cases, conflicts with decisions of this Court

There is a fundamental conflict between the constitutional principles announced by the Supreme Court in *Brown I, Brown II, Green, Raney* and *Monroe* and those announced by this Court first in *Jefferson I* and *Jefferson II* and thereafter radically broadened by *Adams* and succeeding panel decisions.

In *Brown I* the Supreme Court found that "segregation in public education . . . is a denial of equal protection of the laws" and violates the Fourteenth Amendment.

In *Brown II* a constitutionally acceptable school system is described as: "*A racially nondiscriminatory school system*".

In *Cooper* the Court stated the action required to fashion a constitutionally acceptable school system as: "*The elimination of racial discrimination* in the public school system".

In *Goss*[3] the rule was stated: "*That state-imposed separation* in public schools is inherently unequal and *results in discrimination*".

3. *Goss* v. *Bd. of Ed. of Knoxville, Tennessee*, 373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed.2d 632 (1963).

After *Brown I*, and during the period included in the rendition of *Brown II*, *Cooper*, *Goss* and parallel cases, the Fifth Circuit rendered nine decisions construing the constitutional principles announced by the Supreme Court.[4]

A succinct statement of these constitutional principles appears in *Stell*:

> No court has required a "compulsory racially integrated school system" to meet the constitutional mandate that there be no discrimination on the basis of race in the operation of public schools. See Evers v. Jackson Municipal Separate School District, 5 Cir., 1964, 328 F.2d 408, and cases there cited. The interdiction is against enforced racial segregation. Incidental integration, of course, occurs through the process of desegregation. Cf. Stone v. Board of Education of Atlanta, 5 Cir., 1962, 309 F.2d 638.

The panels of this Circuit rendering the nine decisions bottomed upon the *Avery* and *Stell* construction of *Brown I*, *Brown II* and *Cooper* included nine of the members of the Court of Appeals of the Fifth Circuit. For thirteen years the school officials in the hundreds of school districts in the Fifth Circuit relied upon such construction and fashioned their school systems upon its framework. Then, *Jefferson II* (rendered March 29, 1967, with certiorari denied October 9, 1967) swept this aside. Such decision substituted a radically different constitutional concept.

We have already quoted from *Jefferson I*. *Jefferson II* began this radical departure by using one additional word in describing a constitutionally planned and operated school system:

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4. *Avery* v. *Wichita Falls Independent School District*, 1956, 241 F.2d 230; *Borders* v. *Rippy*, 1957, 247 F.2d 268; *Rippy* v. *Borders*, 1957, 250 F.2d 690; *Cohen* v. *Public Housing Administration*, 1958, 257 F.2d 73; *City of Montgomery, Ala.* v. *Gilmore*, 1960, 277 F.2d 364; *Boson* v. *Rippy*, 1960, 285 F.2d 43; *Stell* v. *Savannah-Chatham County Board of Education*, 1964, 333 F.2d 55; *Evers* v. *Jackson Municipal Separate School District*, 1964, 328 F.2d 408; *Lockett* v. *Bd. of Ed. of Muscogee Co.*, 1965, 342 F.2d 225.

> The Court holds that boards and officials administering public schools in this circuit have the affirmative duty under the Fourteenth Amendment to bring about *an integrated*, unitary school system in which there are no Negro schools and no white schools—just schools. . . The necessity of overcoming the effects of the dual school system in this circuit *requires integration* of faculties, facilities, and activities, as well as students. *To the extent that earlier decisions* of this Court (more in the language of the opinions, than in the effect of the holdings) *conflict with this view, the decisions are overruled.*

Later decisions of numerous panels of this Circuit have stretched the meaning and application of such terms far beyond the result originally appearing to be intended.

It does not seem to have been generally recognized that the Supreme Court of the United States in *Green*, *Raney*, *Monroe* and *Carr* not only failed to place its stamp of approval upon *Jefferson II*, but *affirmatively declined to hold that the Fourteenth Amendment requires compulsory integration in public schools.* These cases clearly and unmistakably describe the school system which meets all constitutional guarantees.

In *Green* such system is described as: "*A racially nondiscriminatory school system*"—"a unitary, nonracial system of public education"—"a unitary system in which racial discrimination would be eliminated root and branch."

In *Raney* such system is described as: "*A unitary, nonracial school system*".

In *Monroe* such school system is described as: "A racially nondiscriminatory system"—"*a unitary system in which racial discrimination would be eliminated root and branch*"—"a system without a 'white' school and a 'Negro' school, just schools".

In *Carr* such school system is described as "*A system of public education free of racial discrimination*"—completely unified unitary nondiscriminatory school system"—"a racially nondiscriminatory school system".

This Court affirmatively declined to hold in *Green* that the Fourteenth Amendment requires "compulsory integration", saying:

> The Board attempts to cast the issue in its broadest form by arguing that its "freedom of choice" plan may be faulted only *by reading the Fourteenth Amendment as universally requiring "compulsory integration"*, a reading it insists the wording of the Amendment will not support. *But that argument ignores the thrust of Brown II.* In the light of the command of that case, *what is involved here is the question whether the Board has achieved the "racially nondiscriminatory school system" Brown II held must be effectuated in order to remedy the established unconstitutional deficiencies of its segregated system.*

Contrary to the decision of many of the panels which have cited above *Jefferson II* does not support their holdings for, as Judge Coleman then said:

> Nor do I understand it to direct that there shall be a specified *percentage* of the various races in any particular public school or that there shall be proportional representation of the races brought about by arbitrary order. I agree with Judges Gewin and Bell that the opinion strongly portends such a possibility. *But paragraph 5 of the en banc opinion certainly disclaims any such intention.*

Indeed the panel decisions are a far cry from the description of the role of statistics contained in *Jefferson II* as they do not conform to the constitutional objective announced in the majority opinion:

> *The governmental objective in this conversion is—educational opportunities on equal terms to all.* The

> criterion for determining the *validity* of a provision in a school desegregation plan is *whether the provision is reasonably related to accomplishing this objective.*

The *Adams* dicta and its progeny have arisen through the consideration of one paragraph, one sentence or even a portion of one sentence in *Green, Raney,* or *Monroe.* A study of these opinions as a whole (supplemented by *Carr*) reveal the fallacy of the reasoning upon which the *Adams* dicta was based. The panels of this Court have failed to follow the teachings of these cases. It is only by a consideration of the many complex factors entering into the educational process and particularly into the desegregation of a formerly de jure and formerly de facto segregated school, that we are able to chart the course which is in the best interest of the students *and* of our public schools. This was the objective stated by Mr. Justice Black in *Carr.*

In *Green* the Supreme Court found that the school system of New Kent County was a dual school system and described such system as follows:

> "*Racial identification of the system's schools was complete,* extending not just to the composition of student bodies at the two schools but *to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities.*

In *Green, Raney* and *Monroe* there was considered many of the factors which, *when taken as a whole and in combination,* should be utilized in determining the application of the following test:

> Where the Court finds the board to be acting in good faith and the proposed plan to have real prospects of dismantling the state-imposed dual system "at the *earliest practicable date*" then the plan may be said to provide effective relief. Moreover, whatever plan is adopted will require evaluation in practice. . . .

Yet under the *Adams* dicta, any one of the following factors standing alone will outlaw freedom of choice and require compulsory integration by mandatory student assignment:

If there is an all-Negro school in the district freedom of choice is "impermissible"; or

If "only a small fraction of Negroes [have] enrolled in white schools" freedom of choice is impermissible; or

If "no substantial integration of faculties and school activities" has been attained, freedom of choice is impermissible.

In *Choctaw* a panel bottomed its decision upon a court's finding that there was an all-Negro school in the district and then relied upon statistics holding that it is insufficient to require 10% integration one school year, followed by 20% integration the next year and that even if such percentages were attained, complete student desegregation must be compelled *now* and freedom of choice is rendered constitutionally impermissible.

At one stroke this Circuit set up a test which, under the Court's own announcements, automatically outlaws every freedom of choice system within the Circuit. In *Jefferson I* it was held:

> In this circuit, white students rarely choose to attend schools identified as Negro schools.' (372 F.2d 836, 889).

On April 18, 1968, it was held in *United States v. Board of Ed., Polk County*, 395 F.2d 66, 69:

> The record here discloses, *what the courts have previously commented on*, that is it is rare, almost to the point of nonexistent, that a white child, under a freedom of choice plan, elects to attend a "predomi-

nantly Negro" school. As this court said in the first *Jefferson* case:

> "In this circuit white students rarely choose to attend schools identified as Negro schools. . . ."

Yet on August 20, 1968, only four months later, the *Adams* dicta outlawed any freedom of choice plan "if in a school district there are still all-Negro schools".

Again on September 24, 1968, in *Graves* the panel said:

> In its opinion of August 20, 1968, this Court noted that, under *Green* (and other cases), *a plan that provides for an all-Negro school is unconstitutional.*

Judge Bell sounded a warning in *Jefferson IV* which is accentuated by the decision in these twenty-five consolidated cases. The deviation from accepted constitutional principles and the destructive effect upon the desegregation process is increasing with every decision by a panel of this Court. On July 1 of this year, Judge Bell said in *Jefferson IV*:

> I concur in the opinion and the result thereof *except to the extent, if any, that the decisions of this court cited therein may exceed the requirements laid down by the Supreme Court* in *Green* v. *County School Board of New Kent County, Virginia*, 391 U.S. 430 (1968); *Raney* v. *Board of Education of Gould, Arkansas*, 391 U.S. 443 (1968); *Monroe* v. *Board of Commissioners of the City of Jackson, Tennessee*, 391 U.S. 450 (1968), to-wit: that the dual school systems be disestablished. I am in fundamental disagreement with the approach of an appellate court stipulating the details of transition plans where couched in terms of constantly escalating interim demands. *The specter of escalation, with no end in sight, retards the disestablishment process.*

Congress has never acted as it could have under Section 5 of the Fourteenth Amendment to set uniform standards for disestablishing dual school systems. Meanwhile, no court has defined "disestablishment". My view continues to be that school systems are entitled to know the ultimate standard. *United States v. Jefferson County Board of Education*, 5 Cir., 1967, 380 F.2d 385, dissenting opinion at p. 413.

(4) The Court of Appeals of the Fifth Circuit is in direct conflict with the other Circuits. Jefferson I and Jefferson II (as gradually expanded and varied by sixteen panels) now require compulsory integration in the student bodies and faculties of all schools, leading to the ultimate end of racial balance.

Suddenly the "rug was pulled from under" thousands of devoted educators in the Fifth Circuit by *Jefferson I* and *Jefferson II*. Ever since that time these officials have been kept off balance and unable to mount and pursue a definite and effective program by the perennial changes and expansions of these decisions.

Although the opinion in *Jefferson I* covers sixty-five printed pages and contained many qualifying statements which have kept lawyers and educators confused to this date, the panel decisions have now developed mention that the ultimate effect of this decision is contained in one statement (372 F.2d 845):

> The United States Constitution, as construed in *Brown*, requires public school systems to integrate students, faculties, facilities and activities. As we see it, the law imposes an absolute duty to desegregate, that is, disestablish segregation. And an absolute duty to integrate, in the sense that a disproportionate concentration of Negroes in certain schools cannot be ignored; racial mixing of students is a high priority educational goal.

The great danger in slogans and catch words is that they may be accepted in the belief that they mean one thing and, too late, it will be realized that they meant another. This is true of the decisions in *Jefferson I* and *II*, with their many qualifying and explanatory phrases. In fact, Judge J. P. Coleman specially concurred in *Jefferson II* saying:

> I do not understand that this Court has abandoned freedom of choice, if that choice is real instead of illusory. Nor do I understand it to direct that there be a specified percentage of the various races in any particular public school or that there be proportional representation of the races brought about by arbitrary order . . .

Nevertheless, Judges Gewin and Bell stated at page [illegible] of 380 F.2d the following:

> The majority rule requiring compulsory integration is new and novel, and it has not been accepted by the Supreme Court or by the other circuits.

Seven of the actions included in these consolidated cases were before the panel which decided *Adams* v. *Mathews*, 403 F.2d 181, August 20, 1968, upon appeals from docket settings. Since that date different panels of this Circuit have decided fifteen additional school desegregation cases.[3]

[3] *Adams* v. *Mathews*, No. 26432, August 20, 1968, Judges Wisdom, Goldberg and Morgan, 403 F.2d 181; *Deal* v. *Jefferson*, No. 25439, August 29, 1968, Judges Wisdom, Coleman and Rubin, 403 F.2d 908; *Graves* v. *Walton City*, No. 26432, September 27, 1968, Judges Wisdom, Goldberg and Morgan, 404 F.2d 189; *U. S. A.* v. *Greenwood*, No. 25514, February 4, 1969, Judges Brown, Thornberry and Taylor, 406 F.2d 1086; *Henry* v. *Clarksdale*, No. 24235, March 6, 1969, Judges Wisdom, Thornberry and Coe, 409 F.2d 682; *U. S. A.* v. *Indianola*, No. 25655, April 21, 1969, Judges Dyer, Simpson and Cabot, 410 F.2d 626; *Anthony* v. *Marshall City*, No. 26412, April 15, 1969, Judges Ainsworth, Thomson and Mitchell, 409 F.2d 1287; *Hall* v. *St. Helena*, No. 26430, May 28, 1969, Judges Brown, Gewin and Cabot, F.2d [illegible]; *Davis* v. *Mobile City*, Nos. 26880, 27401, 27280,

These panel opinions conflict with each other and with prior decisions of panels of this Circuit.[6] They construe, restrict, extend, vary and violate not only the principles laid down by this Circuit en banc in *Jefferson II* (limiting *Jefferson I*) but also those laid down by the United States Supreme Court in *Green*, *Monroe* and *Raney*.[7] They conflict with decisions of other Circuits.[8] As a result, the district courts and the school boards in this Circuit are in utter confusion.

The only members of this Circuit serving upon more than two of these panels were Judge Wisdom, who was the presiding judge of nine panels; Judge Brown, who was the presiding judge of four panels, and Judge Thornberry,

June 3, 1969, Judges Brown, Dyer and Hunter, F.2d ; *U. S. A.* v. *Jefferson III*, No. 27444, June 26, 1969, Judges Bell, Goldberg and Atkins, F.2d ; *Hampton* v. *Choctaw Cty.*, No. 27297, June 26, 1969, Judges Wisdom, Carswell and Roberts, F.2d ; *Choctaw Cty.* v. *U. S. A.*, No. 25639, June 26, 1969, Judges Wisdom, Carswell and Roberts, F.2d ; *U. S. A.* v. *Jefferson IV*, No. 26584, July 1, 1969, Judges Wisdom, Bell and Godbold, F.2d ; *U. S. A.* v. *Hinds Cty.*, Nos. 28030, 28042, July 3, 1969, Judges Brown, Thornberry and Morgan, F.2d ; *U. S. A.* v. *Crisp*, No. 27446, July 3, 1969, Judges Wisdom, Morgan and Davis, F.2d ; *U. S. A.* v. *Baldwin Cty.*, No. 27281, July 9, 1969, Judges Wisdom, Carswell and Roberts, F.2d

6. *Broussard* v. *Houston Independent School District*, May 30, 1968, 403 F.2d 34, Petition for Rehearing en banc (in the light of *Green*; *Monroe* and *Raney*) denied October 2, 1968; *Kerce* v. *Richmond County*, July 30, 1968, 399 F.2d 11; *Hopkins* v. *Fairfield*, July 30, 1968, 399 F.2d 11

7. *Green* v. *New Kent Co.* (U.S. Supr. Ct. 1968) 391 U.S. 430, 20 L.Ed.2d 716; *Monroe* v. *Jackson, Tenn.*, (U.S. Supr. Ct. 1968) 391 U.S. 450, 20 L.Ed.2d 733; *Raney* v. *Gould*, (U.S. Supr. Ct. 1968) 391 U.S. 443, 20 L.Ed.2d 727.

8. *Goss* v. *Knoxville*, (6th Cir. 1969), 406 F.2d 1183; *Freeman* v. *Gould*, (8th Cir. 1969) 405 F.2d 1153; *U. S. A.* v. *Cook County*, (7th Cir. 1969) 404 F.2d 1125; *Deal* v. *Cincinnati*, (6th Cir. 1966) 369 F.2d 55; *Springfield* v. *Barksdale*, (1st Cir. 1965) 348 F.2d 261; *Downs* v. *Bd. of Ed. of Kansas City*, 336 F.2d 988 (10th Cir. 1964), cert. denied 380 U.S. 914, 85 S.Ct. 898, 13 L.Ed.2d 800 (1965); *Mapp* v. *Bd. of Ed. of Chattanooga, Tenn.*, 373 F.2d 75 (1967); *Clark* v. *Board of Education*, (8th Cir. 1966, 1967) 369 F.2d 661, rehearing denied 374 F.2d 569; *Bell* v. *Gary*, (7th Cir. 1963) 324 F.2d 209, cert. denied 377 U.S. 924

who sat on four panels. The presiding judges upon the other three panels were Judge Dyer, Judge Bell and Judge Ainsworth. Eleven of these decisions were rendered with only two members of this Circuit participating, the third member of the panel being a District Judge.

The recent decisions of the Court of Appeals of the Fifth Circuit conflict directly with decisions of the Sixth Circuit, the First Circuit, the Seventh Circuit, the Eighth Circuit and the Tenth Circuit. They are in direct conflict with provisions of the Civil Rights Act of 1964 and with the Congressional intent expressed last year in the act carrying the appropriation for the Department of Health, Education and Welfare. All of these are hereinafter quoted.

Through a misconstruction both of the "trilogy of cases", *Green*, *Monroe* and *Raney*, and of the en banc decision of *Jefferson II*, many panels of the Fifth Circuit find themselves in direct conflict with decisions of other Circuits. The dicta of *Adams*, repeated in *Hall*, *Hinds County* and other cases, deviates from the teaching of *Green*, *Monroe* and *Raney* as well as that of *Jefferson II*. As we will later point out, the panels have seized upon numerous elements which were considered in combination and separated them, so that each separate element is now made the sine qua non of continuance of freedom of choice. This is also true in the varying definitions of what constitute the "vestiges of a dual school system" that must be removed.

Hinds County, *Hall*, *Indianola*, *Jefferson III* and other decisions have based their destruction of freedom of choice plans upon dicta first appearing in *Adams*:

> If in a school district there are still *all-Negro schools*, *or only a small fraction of Negroes enrolled in white schools*, or no substantial integration of faculties and school activities then, as a matter of law, the existing plan fails to meet constitutional standards as established in Green.

The panel in *Hinds County* rejected freedom of choice as an acceptable plan in any of the thirty districts, saying: (Comp., pages 278-279, 281-2.)

> The record compels the conclusion that to eliminate the dual character of these schools, *alternative methods of desegregation must be employed* which would include such methods as zoning and pairing. . . .
>
> The proper conclusion to be drawn from these facts is clear from the mandate of Adams v. Mathews, supra: "as a matter of law, the existing plan fails to meet constitutional standards as established in Green."
>
> We hold that these school districts *will no longer be able to rely on freedom of choice as the method for disestablishing their dual school systems.*

The Court of Appeals of the Sixth Circuit determined on February 10, 1969, in *Goss v. Board of Education of Knoxville, Tennessee*, 406 F.2d 1183, that the elimination of all-Negro and all-white schools is not a condition precedent to either the establishment of a unitary, nonracial school system, or to the continuation of a freedom of choice plan of desegregation. The Court found that there were five all-Negro schools in the Knoxville school district. It also found that in 1960 the district had "a school system completely and de jure segregated both as to students and faculty". In holding that the Knoxville school system was constitutionally acceptable, the Court of Appeals said:

> Preliminarily answering question 1, it will be sufficient to say that *the fact that there are in Knoxville some schools which are attended exclusively or predominantly by Negroes does not by itself establish that the defendant Board of Education is violating the constitutional rights of the school children of Knoxville.* Deal v. Cincinnati Bd. of Education, 369 F.2d 55 (6th Cir. 1966), cert. denied, 389 U.S. 847, 88 S.Ct. 39, 19 L.Ed.2d 114 (1967); Mapp v. Bd. of Education, 373 F.2d

> 75, 78 (6th Cir. 1967). *Neither does the fact that the faculties of some of the schools are exclusively Negro prove, by itself, violation of Brown.*

The Court then discussed the rule set forth in *Green*, including in the statement that the school boards are "charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch". In applying this to the Knoxville District and discussing its effect, the Court of Appeals of the Sixth Circuit said:

> The Court further said that it would be their duty "to convert to a unitary system in which racial discrimination would be eliminated root and branch." 391 U.S. at 437-438, 88 S.Ct. at 1694. We are not sure that we clearly understand the precise intendment of the phrase "a unitary system in which racial discrimination would be eliminated," *but express our belief that Knoxville has a unitary system designed to eliminate racial discrimination.*

The Court brushed aside the position that different constitutional principles should be applied to southern states where there had been in the past de jure segregation as contrasted to northern states where there had been in the past de facto segregation. This was of particular importance as *Deal* involved formerly de facto segregation and *Goss* involved formerly de jure segregation. The Court said:

> In Monroe v. Bd. of Commissioners, 380 F.2d 955, 958 (6th Cir. 1967), we expressed *our view that the end product of obedience to Brown I and II need not be different in the southern states, where there had been de jure segregation, from that in northern states in which de facto discrimination was a fortuity.* Our observations in that regard were not found invalid by the Supreme Court's opinion reversing our Monroe decision. See Monroe v. Board of Commissioners, 391 U.S. 450, 88 S.Ct. 1700, 20 L.Ed.2d 733 (1968).

The constitutional principles thus found to be applicable to both southern states and northern states were stated by the Sixth Circuit in *Deal*, cited as supporting authority in *Goss*. *Deal* involved the Cincinnati school system in which de facto segregation had resulted in heavy racial imbalance in the schools.[9] Racial discrimination may be removed by different methods, including freedom of choice plans, validly set up, properly administered, with choices freely exercised without external pressures so that the plan itself (without regard to the statistical results produced by choices thereunder) is constitutionally acceptable. *Hinds County*, *Choctaw*, *Adams* and other decisions actually bottomed solely upon statistics are in direct conflict with both *Goss* and *Deal*. In *Deal* the Sixth Circuit said:

> The cases recognize that the calculus of *equality is not limited to the single factor of "balanced schools"; rather, freedom of choice under the Fourteenth Amendment is a function of many variables* which may be manipulated differently to achieve the same result in different contexts. . . .
>
> *This is in accord with our holding that bare statistical imbalance alone is not forbidden.* There must also be present a quantum of *official discrimination* in order to invoke the protection of the Fourteenth Amendment. . . .
>
> Finally, in the one case in which *a District Court apparently accepted the appellants' theory of racial imbalance*, Barksdale v. Springfield School Comm., 237 F.Supp. 543 (D. Mass. 1965), *the First Circuit, in vacating the decision* and dismissing the complaint without prejudice *specifically rejected any such asserted constitutional right*. Springfield School Comm. v. Barksdale, 348 F.2d 261, 264 (1st Cir. 1965).

9. As detailed below the report to HEW for the school year 1968 revealed that of the 106 schools in the Cincinnati Public School System, forty were composed of students of one race (i.e., more than 99 per cent Negro or 99 per cent white students), of which thirteen schools were Negro and twenty-seven schools were white.

Adams and its progeny, including *Hinds County* and *Hall*, are in direct conflict with *Springfield School Committee* v. *Barksdale*, 348 F.2d 261, rendered by the Court of Appeals of the First Circuit in 1965. The district court found that two of the elementary schools had over 80 per cent Negro pupils, that fourteen elementary schools had no Negro pupils or less than one per cent Negro pupils, and that the school system was racially imbalanced. The Court of Appeals said:

> Having reached its conclusions, the court ordered the defendants to submit a plan to correct racial imbalance in the Springfield schools.

The Court vacated the order of the district court and reversed, stating the constitutional principles as follows:

> Certain statements in the opinion, notably that "*there must be no segregated schools*," suggest an absolute right in the plaintiffs to have what the court found to be "tantamount to segregation" removed at all costs. *We can accept no such constitutional right.* Cf. Bell v. School City of Gary, 7 Cir., 1963, 324 F.2d 209, cert. den. 377 U.S. 924, 84 S.Ct. 1223, 12 L.Ed.2d 216; Downs v. Board of Education, 10 Cir., 1964, 336 F.2d 988, cert. den. 380 U.S. 914, 85 S.Ct. 898, 13 L.Ed.2d 800. . . .
>
> But more fundamentally, when the goal is to equalize educational opportunity for all students, it would be no better to consider the Negro's special interests exclusively than it would be to disregard them completely.

The hard and fast *Adams* rule, the statistically-based *Hinds County* decision, and like decisions conflict with *United States* v. *Cook County*, 404 F.2d 1125, 1135, decided by the Court of Appeals of the Seventh Circuit on December 17, 1968. The panels of this Circuit have brushed aside good faith. They require hard and fast statistical results *now*. To the contrary, the Court said in *Cook County*:

beer about 400% increase every year in both the
lity, desegregation and the student population de-
egation in schools.

Charles A. Armstrong, Principal of Meridian
igh School, testified as follows:

e 196[illegible] well, *actually since 1953 in Meridian*, we've
involved, but since 1960 direct responsibility of
l beginning, of course, rests upon my shoulders
a lot of other people we involve. I would say
we had the best beginning of this year that we
had in any of the time of which I know about
smooth and orderly. *No report of any harass*
ment, any intimidation. Our teachers and our stu-
on the first day of school are ready to teach and
a smooth beginning of school.

Do the Negro students participate in the same ac-
ties as all the other students?

Yes, sir. There's no regard to race or color here

What about your athletic program?

We have Negro students involved in football,
thall and track and baseball. Our championship
ll team of last year one of the starting members
a young man who played tackle, a 265 pound
ter who attracted a lot of attention with his
ts as an athlete. In basketball, we had two
ers, and there were several, eight or nine stu-
who were out for football. This year, one other
student is a starter on the kicking teams. In
thall, we had two members who made our travel
quad and who both played in varsity and B
team. In other activities, in band, I think we

horus, Thespians, all of our club activities, club
ve sponsors from special interests, and class
ll of these service clubs. I think twelve of these
have Negro members by their choice.

Q. What is your own attitude toward desegregation at this school, Mr. Armstrong?

A. Well, I have no problem with the whole idea. These are children. I'm involved in public education. I think it's awfully important that public education continue. I have no problem whatsoever personally with it at all. And I think that these youngsters need to be treated as human beings with educational problems, and everything that we do is directed to this. *With all our students, now, with Negro and the White. This permeates our organization.*

Q. Do you feel that a true and real free choice is being exercised by the students?

A. I do.

Q. *Do you feel that the freedom of choice plan is working, Mr. Armstrong?*

A. *I certainly do.*

BY THE COURT: *Excuse me, Counsel. Do you know of any plan which be more effective than the freedom of choice plan to accomplish the result that the Supreme Court asked for in the Green case,* that is, to destroy every root and branch of the traditional dual system, and at the same time to accomplish the highest level of educational achievement?

BY THE WITNESS: *I don't know of any such plan that would do this. I think that if it happens and as it happens it'll happen with people wanting it to happen by making choices, for people seeing that the process will work by choice.*

The Enterprise Consolidated School District is one of smallest school districts among these consolidated The undisputed testimony appearing in the record Appendix 21 reveals that 27% of the black students in district attend schools formerly predominantly As the ratio of black students to white students this district is 40% black and 60% white, this is an out-

standing achievement. The projected percentage for the school year 1968-1969 is 30%. This demonstrates the unreliability of the statistics appearing in the Petition for Writ of Certiorari, particularly in Note 3 on page 4 thereof. It is said that such statistics are taken "for the most part" from compilations by the United States submitted to the Court of Appeals. However, it is seen by comparing the statistics utilized by the Court of Appeals (Petitioners' Appendix B, pp. 30a-31a), that only seven of the fourteen school districts now before the Court are included therein. This demonstrates a complete unreliability of the figures or "statistics" utilized in this petition.

We have attached as appendix the pertinent extracts from the evidence applicable to the Yazoo City and Yazoo County School Districts. As these districts are about average size they may also be considered typical.

The testimony of Honorable John Holmes, President of the Board of Trustees of the Yazoo City District, is of material importance. He is the son of a former distinguished member of the Court of Appeals of the 5th Circuit, Judge Edwin Holmes, now deceased. The District Court found concerning all of the school districts in the consolidated cases that the injunction prohibiting any member of the faculty from influencing the choice of any parent or student has constituted a major factor in preventing more mixing under the freedom of choice plan (See Petitioners' Appendix A, pp. 4a-5a).

In response to a question concerning such provision of the injunction, Mr. Holmes testified that this particular provision, in his opinion, had destroyed the ability of the school officials to obtain greater numbers of transfers by the students to schools in which their race is in the minority (See Appendix 1 hereto). This record also demonstrates that the one statistic chosen by the Petitioners con-

veys a false picture of the actual accomplishments under the freedom of choice plans.

The one statistic utilized in the petition for Writ of Certiorari is very misleading. An illustration is the fact that in the formerly white Bentonia School the percentage of Negro students to total enrollment averages 15.8% and five grades have more than 20%. In the formerly white Bentonia School the percentage of Negro students varies in the several grades, averaging 10 1/2%. Other evidence appears in the record demonstrating a true compliance with Constitutional requirements.

The Natchez Special Municipal School District is a defendant in one of the 25 consolidated cases. Although not now before this Court, it is typical of the 19 school districts necessarily affected by the determination of the pending proceeding.

The Opinion of the District Court rendered on May 16, 1969 (at p. 9a of Petitioners' Appendix), made a finding concerning the Natchez schools. The Court of Appeals did not disturb this finding in its opinion of July 3, 1968 (appearing at p. 28a of Petitioners' Appendix). Such finding by the District Court is as follows:

> The Natchez schools, appearing as Civil Action No. 1120(W), have demonstrated outstanding progress with the freedom of choice plan. These schools accommodate approximately 10,400 children, 55% of whom are Negro and 45% of whom are white. There are 40 Negro teachers in the predominantly white schools and 53 white teachers in the predominantly Negro schools. There are 456 Negro children in the predominantly white schools. There are 40 white and 70 Negro children in the vocational schools. A Negro is on the school board. All decisions of the school board have been unanimous. It is the view of the Court

in this case that these schools have shown satisfactory and acceptable progress under all of the facts and circumstances in complying with all of the requirements of the model decree. In this case, as in all of these cases, the bare figure statistics are misleading and tell only part of the story.

The evidence introduced at the August 21-22, 1968, hearing discloses that in the Natchez Special Municipal Separate School District (herein referred to as Natchez) does not operate a dual system of schools. All of the schools in the Natchez system are fully and equally accredited by the two Mississippi Accrediting Commissions and by the regional agency known as the Southern Association of Schools and Colleges. All schools in the Natchez system are comparable as to facilities, per pupil expenditure, teacher-pupil ratio and curricula. The Instructional Materials Center for all schools, including library and teaching aid materials, is operated from a central office. The transportation system is desegregated and is operated from a central office, with buses scheduled for the convenience of all students equally. A transportation system within the Natchez city limits, supported entirely by local funds, is operated in order to make the freedom of choice plan more effective.

The Natchez freedom of choice plan is working effectively to accomplish desegregation. *The Natchez school board is composed of members of both races and has never had a dissenting vote on any issue involving school desegregation.* The administrative staff is desegregated. Forty Negro teachers teach in the white schools and 53 white teachers teach in the Negro schools on a permanent half-day basis. Of the 16 attendance centers nine are integrated. Eight of these are predominantly white and one is predominantly Negro. In at least one predominantly white school there are approximately 30% Negro students

in attendance. In the predominantly Negro school which is desegregated, there are approximately 40% white students in attendance. Integration among students of the district increased approximately 100% from the 1967-68 school year to the 1968-69 school year.

All faculty and staff meetings are integrated, and all in-service workshops are integrated. Athletic programs at the various schools are integrated and students of both races are on the squads at the mixed schools.

This extensive integration and complete desegregation has taken place during the two and one-half years since the freedom of choice plan was inaugurated. This is particularly remarkable in view of the "near state of anarchy" which had existed at Natchez during recent months referred to in the District Court's order dated January 28, 1966. During 1965 the District Court rendered its findings of fact and conclusions of law as to Natchez, reciting:

> The City of Natchez and Adams County, Mississippi, are now and have, for the past two months, been subjected to unusual racial tension and unrest. Demonstrations, boycotts, and riots have been and are being threatened, and the situation recently developed to the extent that the National Guard was ordered into said City to protect persons and property against violence.

PRAYER

Petitioners pray that upon the issuance of a writ of certiorari the hearing thereof be expedited as rapidly as is consistent with the filing in this Court of the full records, preparation of transcripts of proper portions thereof and complete briefing by the attorneys for the parties.

Respectfully submitted, this 8th day of October, 1969.

A. F. SUMMER
Attorney General for the
State of Mississippi

JOHN C. SATTERFIELD
Attorney

IN BEHALF OF

CALVIN R. KING, Attorney for Holmes County Board of Education, et als., Civil Action No. 2779(J) in the District Court;

BRIDGFORTH & LOVE; CAMPBELL & CAMPBELL; SATTERFIELD, SHELL, WILLIAMS AND BUFORD, Attorneys for The Yazoo City Municipal Separate School District, The Yazoo County Board of Education and The Holly Bluff Line Consolidated School District, Civil Action No. 1209(W) in the District Court;

HAROLD M. DAVIDSON, Attorney for Leake County School Board, et als., Civil Action No. 3382(J) in the District Court;

HERMAN GLAZIER, Attorney for the Issaquena County Board of Education, et als., The Sharkey County Board of Education, et als., The Anguilla

Line Consolidated School District, et als., and The Sharkey-Issaquena Line Consolidated School District, et als., Civil Action No. 1096(W) in the District Court;

TALLY D. RIDDELL and ROBERT H. COVINGTON, Attorneys for The Enterprise Consolidated School District, et als., The Quitman Consolidated School District, et als., and The Clarke County Board of Education, et als., Civil Action No. 1302(E) in the District Court;

THOMAS H. WATKINS, JOHN ROACH and RICHARD WATSON, Attorneys for North Pike Consolidated School District, Civil Action No. 2807(J) and Wilkinson County School District, Civil Action No. 1160(W) in the District Court;

WILLIAM B. COMPTON, Attorney for The Meridian Separate School District, et als., Civil Action No. 1300(E) in the District Court;

W. A. ALLAIN, Assistant Attorney General for the State of Mississippi, Attorney for all Respondent School Districts;

JOE R. FANCHER and ROBERT GOZA, Attorneys for The Canton Municipal School District, et als., and The Madison County School District, et als., Civil Action No. 3700(J) in the District Court.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief in Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, Including Objections to Petition with Motion to Advance, and Cross-Petition for Writ of Certiorari with Motion to Expedite Hearing, were served on the Petitioners on this 8th day

of October, 1969, by mailing copies of same, postage prepaid, to their counsel of record at the last known address as follows:

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Of Counsel

EXHIBIT A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

Nos. 28030 and 28042

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

HINDS COUNTY SCHOOL BOARD, ET AL.,
Defendants-Appellees.

(Civil Action No. 4075(J))

(The Remaining 24 Consolidated Cases Are Also Captioned but Not Listed Here.)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

PETITION FOR REHEARING IN BANC AND FOR STAY OF PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, OR, IN THE ALTERNATIVE, FOR RECALL OF MANDATE OF THIS COURT

TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT AND THE JUDGES THEREOF:

It is the understanding of counsel for all of the appellees that the foregoing entitled causes were consolidated

by this Court for the purpose of the hearing on appeal, even though counsel have not been furnished with copy of any such order, if such be in existence. Each of the school districts involved is represented by separate counsel, even though there are some counsel that represent more than one of the districts. The facts in each district differ from the facts in the other districts and the issues presented vary with each district. Nevertheless, there are some basic general issues that are common to all of the appellee school districts. Therefore, counsel for appellee school districts have concluded that only one petition should be filed covering these general basic issues that are common to all districts, rather than have separate petitions filed for each of the appellee school districts. Accordingly, this petition is filed on the assumption that the Court will accept this petition as being applicable to all of the appellee school districts, even though it is not signed by the counsel of record for each of the appellee school districts.

This petition for a rehearing of the above entitled causes is being filed with the belief and conviction that it is essential that the issues presented herein receive full and complete consideration by this Court in banc, the proceedings in the district court must be stayed or the mandate of this Court recalled. This petition is being filed in accordance with Rule 40 and Rule 35 of the Rules of Appellate Procedure, and in support of this petition, your petitioners assert as follows:

1. The appellees have not been accorded due process of law in this appeal.

2. Various panels of this court have not been consistent in their interpretation and application of the decision of this Court rendered, in banc, in *United States of*

America v. *Jefferson County Board of Education*, 380 F.2d 385, and this Court, sitting in banc, should establish what was meant by the in banc decision of this Court in the *Jefferson* case, *supra*.

3. Various panels of this Court have not been consistent in their interpretation and application of the decisions of the United States Supreme Court in *Green* v. *County School Board of New Kent County, Virginia*, 319 U.S. 430, 20 L.Ed.2d 716, 88 S.Ct. 1689; *Raney* v. *Board of Education of Gould School District*, 391 U.S. 433, 20 L.Ed.2d 727, 88 S.Ct. 1697; and *Monroe* v. *Board of Commissioners of the City of Jackson, Tennessee*, 391 U.S. 450, 20 L.Ed.2d 733, 88 S.Ct. 1700; and this Court, sitting in banc, should make an interpretation and application of those decisions of the United States Supreme Court that can be uniformly applied.

4. These proceedings involve questions of exceptional importance.

This is a petition, not a brief, and there should not be, and therefore will not be, any extended discussion of the issues involved. It is our intent and purpose, however, to set forth sufficient of the issues to illustrate and demonstrate the need for the grant of the relief sought by this petition.

1. The Appellees Have Not Been Accorded Due Process of Law in This Appeal.

The chronology of events in connection with the appeal to this Circuit is as follows:

A. The district court, consisting of three judges, for the Southern District of Mississippi, sitting in banc, rendered its opinion on May 13, 1969.

B. The district court entered its order pursuant to the foregoing opinion on or about May 16, 1969 in each of the above referenced cases.

C. On May 28, 1969, the district court entered additional findings of fact.

D. Attorneys for the private plaintiffs filed notice of appeal and a motion for summary reversal on June 10, 1969.

E. The United States of America filed notice of appeal on June 12, 1969 in the cases where the United States of America was plaintiff but filed no motion for summary reversal in connection with said notice of appeal.

F. On June 10, 1969, notice was issued by the Clerk of the United States Court of Appeals for the Fifth Circuit to the attorneys for the school districts in which there were private plaintiffs, that the motion for summary reversal would be presented for ruling without oral argument on or about June 20, 1969, together with any response or opposition that may be filed by opposing counsel by that date.

G. On June 23, 1969, the United States of America filed a "Motion for Summary Reversal and Motion to Consolidate Appeals, etc." in the cases in which the United States of America was plaintiff.

H. On June 23, 1969, the Clerk of the United States Court of Appeals for the Fifth Circuit mailed a letter to counsel of record to the effect that the motion of the United States of America had been filed and would be presented on or about July 3, 1969 together with any response or opposition that may be filed by opposing counsel by that date. This notice was received by some of the counsel on June 24, 1969 and other counsel on later dates.

I. On June 24, 1969, the district court entered an "order as to the appellate record" in which the district court recognized that the record in these cases was voluminous and that it would be "a Herculean task for the appellate court to examine such a voluminous record in any reasonable length of time". Accordingly, the district court ordered that appellants' counsel was to file with the Clerk of the court within five days a designation of so much of the record in each of the cases that they desired to be used in the appeal. The district court further ordered that within three days after receipt of a copy of such designation by appellants' counsel, appellees' counsel was to file a designation of those parts of the record not previously designated which they deemed necessary for use on appeal. The court further ordered that the Clerk should have thirty days in which to prepare the record and to forward same to the Clerk for the Court of Appeals for the Fifth Circuit in New Orleans.

J. On June 25, 1969, the Clerk of the United States Court of Appeals for the Fifth Circuit addressed a letter to counsel of record in all cases, including those in which there were private plaintiffs and those in which the plaintiff was the United States of America, to the effect that the Court would hear oral argument on all of these cases "on the motion for summary reversal and the *merits* in all of the cases both private plaintiffs and those of the United States". (Emphasis added). This letter further advised that the argument would be held in New Orleans beginning at 9:30 A.M., July 2, 1969, and any memoranda or responses would have to be filed in the office of the Clerk by noon, July 1, 1969. In this letter, it was recited that the Court had taken notice of the district court's order with respect to the record but that since appeal was being expedited on the original record, the United States attorney

should make arrangements with the District Clerk to transmit to the Clerk of the Court of Appeals the entire record of the district court so that same would be available to the Court if needed during the argument and summation. It was further stated that the Court recognizes that "this is a huge record involving a large number of parties and matters of great public interest and importance".

K. The foregoing letter dated June 25, 1969 was received by some of the counsel of record on June 26, 1969 and by others on June 27, 1969. This meant that counsel had, at best, Friday June 27, Saturday June 28, Sunday June 29 and Monday June 30 to prepare any response, since it had to be filed by noon, July 1, 1969.

L. Briefs filed by the United States of America were received by some of the counsel on Monday, June 30, 1969 and by others on Tuesday, July 1, 1969. In addition, supplements to the brief were delivered to counsel on the morning of the hearing, July 2, 1969. Thus, counsel were afforded no opportunity whatsoever to examine or inspect same in order to reply thereto either in writing or orally.

M. The proposed opinion-orders as submitted by the private plaintiffs and the United States of America were not submitted to nor seen by opposing counsel until the morning of the hearing, July 2. Accordingly, there was no opportunity to examine same or make any meaningful comments in regard thereto.

N. The record in the district court was brought into the courtroom and was present during the argument on July 2. It is the understanding of counsel that this record consisted of four large packing boxes and that these boxes were still sealed as same had been sealed by the Clerk of the district court and remained sealed during the entire argument.

O. The oral argument of counsel was concluded during the middle of the afternoon on July 2.

P. The opinion of the panel of this Court was entered July 3, 1969, applying to all of the cases.

It is submitted that the record in these cases has not been examined by any member of the Fifth Circuit Court of Appeals. Yet, on July 1, 1969, another panel of the Fifth Circuit in Cause No. 27281, styled *United States of America* v. *Board of Education of Baldwin County, Georgia,* rendered an opinion in which it was stated as follows:

> "In the case now before the Court, we conclude, after a study of the record, that the district court correctly decided that a freedom of choice plan was more suitable than a zoning plan for Baldwin County, Georgia. We base this conclusion on the county's racial residential patterns, the location of the schools and the projections for 1969-70."

Thus, we have a clearcut illustration and demonstration of, in one case, a panel of this Court examining the record of a case and, after analysis of the facts of that particular case, reaching a conclusion. No consideration was given by the panel deciding these cases as to the facts as they exist in any of these cases other than bare statistics; and, in the panel's opinion which purported to cover statistics in each of the districts involved, the Court omitted any findings of statistics as to a number of the school districts which were appellees.

2. Various Panels of This Court Have Not Been Consistent in Their Interpretation and Application of the Decision of This Court Rendered, In Banc, in United States of America v. Jefferson County Board of Education, 380 F.2d 385, and This Court, Sitting In Banc, Should Establish What Was Meant by the In Banc Decision of This Court in the Jefferson Case, Supra.

(The discussion under this point is omitted as the entire Petition is a part of the Record in the Supreme Court of the United States.)

3. Various Panels of This Court Have Not Been Consistent in Their Interpretations and Application of the Decisions of the United States Supreme Court in Green v. County Board of Education of New Kent County, Virginia, 319 U.S. 430, 20 L.Ed.2d 716, 88 S.Ct. 1689; Raney v. Board of Education of Gould School District, 391 U.S. 433, 20 L.Ed.2d 727, 88 S.Ct. 1697; and Monroe v. Board of Commissioners of the City of Jackson, Tennessee, 391 U.S. 450, 20 L.Ed.2d 733, 88 S.Ct. 1700; and This Court, Sitting In Banc, Should Make an Interpretation and Application of Those Decisions of the United States Supreme Court That Can Be Uniformly Applied.

The United States Supreme Court in the *Green* case, *supra*, *Raney* case, *supra*, and *Monroe* case, *supra*, clearly enunciated the basic principles that the Constitution requires all districts to be operated on a unitary, nonracial, nondiscriminatory basis and that, in districts having a history of *de jure* segregation, the school boards operating such school systems were required to effectuate a transition to a racially nondiscriminatory school system. In this context, the Supreme Court stated that steps must be taken in which racial discrimination would be eliminated, root and branch. These decisions, it is submitted, clearly establish that each school district of the nation

must be operated as a unitary, nonracial, nondiscriminatory school district and that, in districts that have a history of *de jure* segregation, the trustees of the school district have the affirmative duty of "eradicating the last vestiges of the dual system". The confusion and misunderstanding now rampant in this Circuit grows out of the interpretation and application of these basic concepts. It is essential that this confusion be eliminated. Literally hundreds of thousands of children are involved, as well as the entire educational system. The interpretation and application of these basic concepts, it is submitted, is probably the most important question facing the courts of this nation today. Involved in the answer to this question is whether the schools will be operated, in their day to day operations, by a federal department under the supervision and guidance of the federal judiciary, or whether the officials of the districts can, through qualified educators, operate the schools in conformity with the concepts of the applicable provisions of the Constitution as defined by the courts.

The two concepts are as follows: (A) a unitary, nonracial, nondiscriminatory school system, and (B) the vestiges of a dual system which must be removed by the trustees of the school districts. We will briefly discuss these two concepts with the thought in mind of at least demonstrating the necessity for a clearcut, understandable judicial definition—a definition that is based upon constitutional principles and not upon the changing guidlines of a department of the executive branch of our government dealing with the expenditure of funds.

A. What is a unitary, nonracial, nondiscriminatory school system?

It is submitted that the answer to this question is not too difficult. It is a school system which is open and free

to all pupils and in which race is not a factor. In fact, if it is to be "nonracial", then it is a contradiction on its face to take action that is motivated by the race of the pupil. One panel of the Fifth Circuit has given a definition in the *Broussard* case, *supra,* as follows:

> ". . . it would appear than an 'integrated, unitary school system' is provided where every school is open to every child. It affords 'educational opportunities on equal terms to all.' That is the obligation of the Board."

This Court in the *Jefferson* decision, *supra,* in banc, stated as follows:

> "The governmental objective of this conversion is—educational opportunities on equal terms to all."

It is submitted that this concept is clear, can be followed and implemented by school trustees of all school districts. The school districts throughout the nation, whether they have a history of *de jure, de facto,* or no segregation at all, must be operated on a unitary, nonracial basis. This is easily understood and can be easily implemented by the trustees that are acting in good faith. If the trustees are not acting in good faith, such can be easily demonstrated to and corrected by the district court and will not require that the federal courts become involved in the day to day operations of the schools in the school districts.

It is submitted that, if this Court *in banc* expressly adopts the definition of a unitary, nonracial, nondiscriminatory school system as succinctly set out in *Broussard, supra,* which, with deference, it ought to do, then the only problem which would remain would be to properly deal with the second concept.

B. What are the vestiges of the dual system which must be eradicated by the trustees of the school districts?

Quite frankly, it would also appear that the answer to this question should not be too difficult. It is submitted, however, that some of the recent decisions of various panels of this Court have made requirements of school districts that are *not* in keeping with the obligation to remove the vestiges of the dual system and have thereby created confusion and consternation concerning the meaning of this obligation.

Our discussion here will be based upon the assumption that we are correct in that the obligation of the trustees of the school districts located in formerly *de jure* segregated states is the affirmative duty to eradicate the last vestiges of the dual system. If this be true, then these vestiges must be identified and eradicated. It is not enough to operate a unitary system at this time. These trustees must go further and eradicate or eliminate any vestiges of the dual system.

Illustrative of the points we are attempting to make here is the decision by a panel of this Court in the *Adams* case, *supra*. The panel in the *Adams* case, *supra*, with no record before it, and with no opportunity being offered counsel to be heard, made a specific finding that an all-Negro school was a vestige of the dual system and must be eradicated in all districts in the Fifth Circuit. Since that time, the language in the *Adams* decision, *supra*, has been quoted by several panels of this Court. Insofar as we know, however, no case has ever been presented to this Court which contained facts which would support a finding that this is a vestige of a dual system. A study of the history of litigation in this field indicates that the "racial statistics" approach as a measuring device for determining whether the last vestiges of the dual system have been removed originated with the office of Health,

Education and Welfare. That office promulgated guidelines which contained statistical requirements to be used in determining whether funds would be made available to the various school districts. It is submitted that this approach has been adopted by some of the panels in this Circuit as a constitutional requirement, when, as a matter of fact, the office of Health, Education and Welfare has no authority to make constitutional interpretations that are binding on the courts and that office had no hearing or proof upon which to reach such a conclusion in the first place. Certainly the decisions of this court should be supported by proof.

If it be assumed that the Fifth Circuit has found, without the benefit of any proof of any kind, that an all-Negro school constitutes a vestige of the dual system, then we think it important that this Court's attention be called to the case of *Goss* v. *Board of Education of Knoxville, Tennessee,* 406 F.2d 1183 (decided February 10, 1969). In the *Goss* case, *supra,* the Court of Appeals for the Sixth Circuit specifically found and adjudicated that:

> "The fact that there are in Knoxville some schools which are attended exclusively or predominantly by Negroes does not by itself establish that the defendant Board of Education is violating the constitutional rights of the school children of Knoxville. . . . Neither does the fact that the faculties of some of the schools are exclusively Negro prove, by itself, violation of *Brown.*"

We do not know the extent of the proof, if any, on this particular point that was in the record in the Goss case; however, for purposes of presenting the point here being discussed we are assuming that there was *no actual* proof before the court and that the Sixth Circuit, like the Fifth Circuit, has made a finding based on taking judicial notice.

The situation is, therefore, that we have Courts of Appeal for different circuits reaching opposite conclusions based on judicial notice and without the benefit of any actual proof in the record on which these conclusions could be based.

In these proceedings now before this Court, there is proof, which was uncontradicted, that the existence of all-Negro schools is *not* a vestige of the dual system. In addition, there has been filed in the Fifth Circuit statistical information taken from the official records of the office of Health, Education and Welfare showing the racial composition of schools in the one hundred largest school districts in this nation. Most of these districts have never had a dual system. These statistics show, and we submit this is conclusive, that all-white and all-Negro schools exist in every school district where there is a large percentage of both white and Negro pupils. These statistics show, beyond question, that all-white and all-Negro schools do exist in school districts that have never had a dual system. As a matter of fact, of the 12,497 schools in these one hundred school districts, assuming that a school with less than one percent of the minority race is an all-Negro or all-white school, 6,137 are either all-white or all-Negro. In other words, over forty-eight percent of the schools in the one hundred largest school districts in this nation are either all-white or all-Negro. Most of these districts are in areas that have never had a dual system. We submit, therefore, that for this Court to adjudicate that the existence of an all-Negro or an all-white school is, in and of itself, a vestige of the dual system is without support of any proof, is incorrect, and is clearly erroneous.

It is submitted that such a finding by a panel of this Court is not in keeping with the opinion of this Court in

the in banc *Jefferson* decision. The language of this Court in *Jefferson*, sitting in banc, was that there was to be "no Negro schools and no white schools—just schools". This language of this Court in its in banc decision is in accord with the obligation of the school trustees to operate a unitary school system. The schools are not to be Negro schools nor are they to be white schools. They are to be just schools. This does not, however, mean that there must be both white and Negro pupils in attendance at each and every school. Since the existence of schools at which only Negroes attend, or the existence of schools at which only whites attend is *not*, in and of itself, a vestige of the dual system, then there is no constitutional basis on which the courts may or can require their elimination or eradication as being a vestige of the dual system.

For the benefit of this Court, we are attaching as Exhibit "A" to this petition the report of Peat, Marwick, Mitchell and Company, dated June 27, 1969, which, it is submitted, is self-explanatory.

In addition to the foregoing, there is in this record testimony of experts which demonstrates conclusively that (1) all-Negro or all-white schools are not vestiges of the dual system and (2) a definite or specific amount of integration of the races in the schools is not an indication or even proof that the schools are operated on a unitary basis with the vestiges of the dual system eliminated or eradicated—at best, it is only peripherally relevant to the issues.

This evidence also stands uncontradicted and will be discussed and presented in full, if this petition is granted and this Court hears these cases in banc.

What we have stated concerning pupils is equally applicable to faculties. The proof is that an all-Negro fac-

ulty or an all-white faculty is not, in and by itself, a vestige of the dual system and does not destroy the unitary nature of the school system.

Other illustrations could be given. It is submitted, however, that the foregoing discussion points up the absolute necessity of this Court, in banc, determining the issues presented by these cases. We feel that this is particularly true in view of the fact that some of the panels of this Court, without the benefit of a record, have adjudicated that all-Negro schools cannot exist, while other panels of this Court have, upon review of the record, permitted all-Negro schools to exist.

4. The Decision of This Panel Is Contrary to the Civil Rights Act of 1964 and other Federal Statutes Enacted under Authority of Section 5 of the Fourteenth Amendment.

(The discussion under this point is omitted as the entire Petition is a part of the Record in the Supreme Court of the United States.)

5. This Is a Case of First Impression in Which It Has Been Proved by Competent Evidence Admitted by the District Court and by the Court of Appeals That Freedom of Choice Is the Most Promising Course of Action to Bring About Meaningful and Lasting Desegregation.

(The discussion under this point is omitted as the entire Petition is a part of the Record in the Supreme Court of the United States.)

6. Recall of the Mandate or Stay of Further Proceedings by the District Court Is Necessary If Justice Is to Be Done in These Twenty-Five Cases.

(The discussion under this point is omitted as the entire Petition is a part of the Record in the Supreme Court of the United States.)

CONCLUSION

It is respectfully submitted that it is *essential* that the relief sought herein be granted. Not only are the school districts included in this proceeding vitally affected —but every district in this Circuit. In some of the larger districts, the eradication of schools attended only by Negroes or only by whites will be an impossibility—yet, this, according to a panel of this Court, is unconstitutional. Obviously, this holding is, in effect, a holding that the Constitution requires one thing in one school district and an entirely different thing in another school district. *If an attempt is made to justify such inconsistency by referring to the factual situation in the respective school districts, then the fact is that the record in these cases was not even examined to attempt to determine the facts.*

If the courts are to require the trustees and boards of education to take action that is not based upon constitutional concepts, then the courts will have launched into the detailed operations of the schools of this Circuit which will become only more involved and to which there will be no end. The issues here presented are vital and should receive the attention of this full Court, sitting in banc. Until this has been done and the decision made after full consideration, the action of the district court in these cases should be stayed or the mandate should be recalled. The actual continued existence of a responsible public educational program may be involved in many of the districts in this Circuit.

EXHIBIT TO PETITION FOR REHEARING IN BANC

PEAT, MARWICK, MITCHELL & CO.
Certified Public Accountants
Post Office Box 690
1232 First National Bank Building
Jackson, Mississippi 39205

Mr. Robert C. Cannada
Attorney-at-Law
Jackson, Mississippi

Dear Sir:

In accordance with your request we have prepared the attached schedule which reflects an analysis of student enrollment and professional instructional staff of the one hundred largest school districts, based on student enrollment, in the United States.

The information contained in the schedule was summarized from data obtained by our personnel from Office for Civil Rights forms OS/CR 102-1 and OS/CR 101 or from data processing cards or tapes filed in lieu of the specified forms, which are on file with the U. S. Department of Health, Education and Welfare, Washington, D. C.

The above mentioned forms which were required, under Title VI of the Civil Rights Act of 1964, to be filed by each school district by October 15, 1968 contain generally the following information:

Form OS/CR 102-1, Individual School Report:

School enrollment, with breakdown of minority group membership

Professional instructional staff, with breakdown of minority group membership

Form OS/CR 101, School System Report:

Summary of information contained in individual school reports for district related schools

As instructed by you we did not ascertain whether the school system reports agreed with the combined total of the individual school reports for each district.

The figures reflected in columns 1, 2, 4, 9 and 10 of the attached schedule were taken from the school system reports (Form OS/CR 101) and the figures in columns 5, 6, 7, 8, 12, 13, 14, and 15 were summarized by us from the individual school reports (Form OS/CR 102-1). As instructed by you we considered all students and staff members not designated as minority group members on the forms to represent white students and white instructional staff.

The school districts listed in the schedule were represented to us by the Department of Health, Education and Welfare to be the one hundred largest in the United States. We did not attempt to verify the correctness of this representation.

In our opinion, the accompanying schedule fairly sets forth the analytical data as to student enrollment and professional instructional staff of the school districts listed therein as extracted from the above referenced documents.

/s/ Peat, Marwick, Mitchell & Co.

June 27, 1969

Analysis of Student Enrollment and Professional Instructional Staff of One Hundred Largest School Districts

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column
	STUDENTS							
	Enrollment							
District	White	Negro	Total White and Negro Enrollment	Total Schools in District	No. of Schools in Which No White Students are Enrolled	No. of Schools Having Less Than 1% White Enrollment	No. of Schools in Which No Negro Students are Enrolled	No. of Schools Having Less Than 1% Negro Enrollment	White
Chicago Public Schools, Chicago, Ill.	219,478	308,266	527,744	610	141	67	132	52	15,67
Fort Wayne Community Schools, Fort Wayne, Ind.	35,377	5,760	41,137	56	-	-	8	13	1,75
Indianapolis Public Schools, Indiana	72,010	36,577	108,587	119	6	11	18	17	3,46
Des Moines Community Schools, Iowa	42,425	3,611	46,036	81	-	-	14	22	2,05
Jefferson Co. Schools, Louisville, Kentucky	82,354	4,109	86,463	82	-	1	33	21	3,63
Louisville Indep. Schools, Kentucky	29,702	25,470	55,172	65	2	5	7	3	1,75
East Baton Rouge Schools, Louisiana	39,770	23,753	63,523	102	34	2	18	17	2,00
Calcasieu Parish School Board, Lake Charles, La.	29,104	9,934	39,038	73	21	-	13	12	1,36
Anne Arundel Co. Schools, Annapolis, Maryland	56,457	8,923	65,380	90	-	-	6	9	2,74
Baltimore City Public Schools, Maryland	66,997	125,174	192,171	204	63	26	10	11	3,85
Montgomery Co. Public Schools, Rockville, Md.	113,630	4,872	118,502	173	-	-	9	51	5,57
Baltimore Co. Board of Ed., Baltimore, Md.	119,378	4,299	123,677	160	-	-	38	40	5,97
Prince George Co. Board of Ed., Marlboro, Md.	124,663	22,313	146,976	210	5	1	20	39	6,13
Boston School Department, Massachusetts	64,500	25,482	89,982	196	1	10	30	15	4,84
Detroit Public Schools, Michigan	115,225	176,478	291,703	302	20	47	18	13	7,66
Special School Dist. No. 1, Minneapolis, Minn.	62,490	5,255	67,745	98	-	-	19	23	3,30
Indep. School Dist. No. 625, St. Paul, Minn.	46,686	2,917	49,603	83	-	-	22	18	2,07
St. Louis City School Dist., Mo.	41,806	73,408	115,214	164	62	21	25	6	2,12
Kansas City School Dist., Mo.	39,510	34,692	74,202	99	7	12	18	6	1,04
Omaha Public Schools Dist. No. 1, Neb.	49,932	11,284	61,216	95	-	2	22	24	2,37
Newark Public Schools, Newark, N. J.	13,716	55,057	68,773	80	10	17	-	-	2,83
Clark Co. School Dist., Las Vegas, Nev.	56,723	8,233	64,956	86	-	1	20	18	2,64
Jersey City School Dist., N. J.	16,457	15,998	32,455	35	1	1	-	3	1,51
Albuquerque Public School System, N. M.	47,710	1,897	49,607	110	-	1	25	36	2,77
Charlotte - Mecklenburg Schools, N. C.	58,623	24,241	82,864	112	14	6	16	12	2,91
Winston-Salem/Forsyth Co., Winston-Salem, N. C.	35,975	13,798	49,773	67	14	-	11	10	1,57
Oklahoma City Public School Dist., I-89, Okla.	58,472	16,255	74,727	115	3	12	45	21	2,42
Portland Public Schools, Oregon	71,331	6,463	77,794	115	-	-	9	31	3,47
Independent School Dist. No. 1, Tulsa, Okla.	66,413	9,728	76,141	105	6	2	52	21	2,88
Pittsburgh City School Dist., Pa.	46,005	29,898	75,903	113	6	7	9	4	3,10
Charleston Co. School Dist., Charleston, S. C.	30,351	16,730	47,081	73	29	-	5	1	1,34
Richland Co. School Dist., Columbia, S. C.	21,387	18,735	40,122	63	20	4	4	3	1,14
Greenville Co. Schools, Greenville, S. C.	43,853	12,453	56,306	103	20	1	19	19	1,97
Shelby Co. School Dist., Memphis, Tenn.	29,618	14,281	43,899	51	17	1	8	8	1,16
Memphis City School System, Tenn.	58,271	67,395	125,666	128	43	4	28	13	2,84
Metro. Nashville-Davidson Co. Schools, Tenn.	71,039	22,561	93,600	142	14	1	29	18	3,16
Austin Indep. School Dist., Texas	33,934	7,783	41,717	67	3	4	11	19	2,20
Corpus Christi School Dist., Texas	21,097	2,496	23,593	60	3	3	20	17	1,72
Dallas Indep. School Dist., Texas	97,888	49,235	147,123	173	17	9	79	12	5,11
El Paso Indep. School Dist., Texas	26,294	1,804	28,098	62	3	3	5	18	2,32
Fort Worth Indep. School Dist., Texas	58,011	21,398	79,409	118	15	3	45	11	2,86
Birmingham Public Schools, Ala.	32,278	34,156	66,434	102	41	2	15	6	1,21

and Professional Instructional Staff
rgest School Districts

3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12	Column 13	Column 14	Column 15
	STUDENTS					PROFESSIONAL INSTRUCTIONAL STAFF						
te o t	Total Schools in District	No. of Schools in Which No White Students are Enrolled	No. of Schools Having Less Than 1% White Enrollment	No. of Schools in Which No Negro Students are Enrolled	No. of Schools Having Less Than 1% Negro Enrollment	White	Negro	Total White and Negro	No. of Schools Having No White Instructional Staff Members	No. of Schools Having Less Than 20% White Instructional Staff Members	No. of Schools Having No Negro Instructional Staff Members	No. of Schools Having Less Than 20% Negro Instructional Staff Members
4	610	141	67	132	52	15,678	7,825	23,503	8	80	228	109
7	56	-	-	8	13	1,753	74	1,827	-	-	31	20
7	119	6	11	18	17	3,467	1,009	4,476	-	3	1	74
6	81	-	-	14	22	2,059	44	2,103	-	-	52	28
3	82	-	1	33	21	3,638	70	3,708	-	-	61	19
2	65	2	5	7	3	1,759	775	2,534	1	9	2	37
3	102	34	2	18	17	2,005	973	2,978	17	17	20	46
8	73	21	-	13	12	1,361	408	1,769	14	1	44	8
0	90	-	-	6	9	2,747	382	3,129	-	-	9	60
1	204	63	26	10	11	3,859	4,350	8,209	29	56	2	41
2	173	-	-	9	51	5,579	296	5,875	-	-	51	114
7	160	-	-	38	40	5,977	263	6,240	-	1	73	80
6	210	5	1	20	39	6,132	972	7,104	-	5	35	123
2	196	1	10	30	15	4,841	234	5,075	-	1	108	78
3	302	20	47	18	13	7,669	4,830	12,499	1	6	9	92
5	98	-	-	19	23	3,309	122	3,431	-	-	52	43
3	83	-	-	22	18	2,070	40	2,110	-	-	59	21
4	164	62	21	25	6	2,128	2,455	4,583	48	28	33	34
2	99	7	12	18	6	1,049	1,959	3,008	1	12	13	46
5	95	-	2	22	24	2,373	160	2,533	-	-	72	13
3	80	10	17	-	-	2,834	1,240	4,074	-	-	1	23
5	86	-	1	20	18	2,646	136	2,782	1	-	48	32
3	35	1	1	-	3	1,511	205	1,716	-	-	4	27
7	110	-	1	25	36	2,774	41	2,815	-	-	83	27
4	112	14	6	16	12	2,910	961	3,871	14	7	-	79
3	67	14	-	11	10	1,576	606	2,182	-	13	-	46
7	115	3	12	45	21	2,424	544	2,968	-	2	5	82
4	115	-	-	9	31	3,479	123	3,602	-	-	80	32
1	105	6	2	52	21	2,887	377	3,264	1	-	2	92
1	113	6	7	9	4	3,109	428	3,537	-	-	49	42
	73	29	-	5	1	1,345	597	1,942	10	15	21	23
	63	20	4	4	3	1,149	679	1,828	4	19	15	23
1	103	20	1	19	19	1,976	469	2,445	13	8	64	17
1	51	17	1	8	8	1,161	548	1,709	1	2	-	14
1	128	43	4	28	13	2,841	2,276	5,117	5	38	2	69
1	142	14	1	29	18	3,169	853	4,022	-	15	39	68
	67	3	4	11	19	2,204	369	2,573	-	7	11	43
	60	3	3	20	17	1,729	60	1,789	-	-	22	36
	173	17	9	79	12	5,112	1,665	6,777	21	10	128	6
	62	3	3	5	18	2,321	69	2,390	-	1	39	22
	118	15	3	45	11	2,864	852	3,716	9	12	69	21
	102	41	2	15	6	1,213	1,189	2,402	22	24	-	50

Analysis of Student Enrollment and Professional Instructional Staff of One Hundred Largest School Districts, Continued

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Col
	STUDENTS								
	Enrollment								
District	White	Negro	Total White and Negro Enrollment	Total Schools in District	No. of Schools in Which No White Students are Enrolled	No. of Schools Having Less Than 1% White Enrollment	No. of Schools in Which No Negro Students are Enrolled	No. of Schools Having Less Than 1% Negro Enrollment	White	Ne
Jefferson Co. Schools, Birmingham, Ala.	47,142	18,186	65,328	106	29	-	49	7	2,019	
Mobile Co. Schools, Mobile, Ala.	44,023	31,441	75,464	92	20	9	14	8	1,524	1
San Juan School Dist., Carmichael, Calif.	51,481	134	51,615	77	-	-	27	45	2,194	
Montgomery Co. Schools, Montgomery, Ala.	22,402	16,691	39,093	54	20	-	4	8	823	
Fresno City School Dist., Fresno, Calif.	40,748	5,251	45,999	74	1	2	8	22	2,309	
Garden Grove School Dist., Garden Grove, Calif.	47,147	83	47,230	70	-	-	40	28	1,956	
Long Beach School Dist., Long Beach, Calif.	61,454	5,489	66,943	78	-	-	19	27	2,934	
San Francisco School Dist., Calif.	40,824	25,923	66,747	154	3	3	2	5	4,223	
Los Angeles School Dist., Calif.	350,909	147,738	498,647	591	19	46	91	203	21,376	3
Mt. Diablo Unified Schools, Concord, Calif.	45,645	369	46,014	56	-	-	21	26	2,122	
Oakland Unified Schools, Oakland, Calif.	19,835	35,386	55,221	88	3	9	-	-	2,227	
Richmond Unified, Richmond, Calif.	28,860	10,424	39,284	63	1	1	6	7	1,676	
Sacramento City Unified, Calif.	34,763	7,324	42,087	77	-	-	-	3	1,925	
San Diego Schools, Calif.	98,163	15,004	113,167	153	-	1	24	46	5,381	
School Dist. No. 1, City & Co. of Denver, Colo.	63,398	13,639	77,037	116	-	3	16	35	4,166	
Jefferson Co. Schools, Lakewood, Colo.	58,909	60	58,969	111	-	-	78	30	2,594	
District of Columbia Public Schools	8,280	139,006	147,286	188	55	59	-	-	1,645	6
Dade Co. Public Schools, Miami, Fla.	135,598	56,518	192,116	215	29	13	58	35	8,037	2
Orange Co. Board, Orlando, Fla.	63,034	13,055	76,089	96	17	-	25	19	2,630	
Hillsborough Co. Schools, Tampa, Fla.	74,573	19,212	93,785	131	21	2	38	15	3,260	
Palm Beach Co. Board, West Palm Beach, Fla.	42,972	17,158	60,130	91	21	-	11	18	2,549	
Brevard Co. Board, Titusville, Fla.	55,811	6,327	62,138	67	2	-	8	11	2,617	
Pinellas Co. Board, Clearwater, Fla.	65,296	12,715	78,011	109	5	6	44	11	3,311	
Duval Co. Board, Jacksonville, Fla.	87,999	34,638	122,637	135	24	4	26	18	4,100	1,
Broward Co. Board, Fort Lauderdale, Fla.	77,487	24,516	102,003	107	20	3	31	15	3,808	
Escambia Co. Board, Pensacola, Fla.	33,729	12,924	46,653	76	18	-	12	9	1,603	
Polk Co. Schools, Bartow, Fla.	40,371	11,652	52,023	94	19	-	19	6	1,990	
Dekalb Co. Schools, Decatur, Ga.	73,695	4,124	77,819	102	3	-	42	25	3,229	
Gary Community Schools, Gary, Ind.	14,063	29,826	43,889	45	13	8	2	2	973	1,
Unified School Dist. No. 259, Wichita, Kan.	58,060	8,913	66,973	116	-	2	42	13	3,173	
New Orleans Public Schools, La.	34,673	74,378	109,051	131	45	16	8	3	2,260	2,
Atlanta Public Schools, Ga.	42,506	68,662	111,168	160	63	9	20	9	2,354	2,
Muscogee Co. Schools, Columbus, Ga.	29,571	12,517	42,088	67	13	3	20	9	1,317	
Chatham Co. Schools, Savannah, Ga.	24,967	17,449	42,416	63	24	2	3	6	1,076	
Cleveland, Ohio, Cuyahoga Co.	66,324	87,241	153,565	180	23	34	35	23	4,184	2,
Cincinnati, Ohio, Hamilton Co.	49,231	37,275	86,506	106	8	5	11	16	2,990	
Toledo, Ohio, Lucas Co.	43,658	16,473	60,131	76	2	1	18	10	2,275	
Akron, Ohio, Summit Co.	43,341	15,137	58,478	71	1	1	11	12	2,304	
Columbus, Ohio, Franklin Co.	81,655	28,729	110,384	168	2	4	38	33	4,124	
Dayton, Ohio, Montgomery Co.	36,582	22,790	59,372	69	4	10	13	8	1,963	
Tacoma, Wash., Pierce Co.	32,646	3,535	36,181	66	-	-	3	4	1,839	
Seattle, Wash., King Co.	77,293	10,376	87,669	130	-	-	10	15	4,131	

d Professional Instructional Staff
hool Districts, Continued

Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12	Column 13	Column 14	Column 15
STUDENTS					PROFESSIONAL INSTRUCTIONAL STAFF						
Total Schools in District	No. of Schools in Which No White Students are Enrolled	No. of Schools Having Less Than 1% White Enrollment	No. of Schools in Which No Negro Students are Enrolled	No. of Schools Having Less Than 1% Negro Enrollment	White	Negro	Total White and Negro	No. of Schools Having No White Instructional Staff Members	No. of Schools Having Less Than 20% White Instructional Staff Members	No. of Schools Having No Negro Instructional Staff Members	No. of Schools Having Less Than 20% Negro Instructional Staff Members
106	29	-	49	7	2,019	666	2,685	14	11	24	56
92	20	9	14	8	1,524	1,091	2,615	6	25	1	51
77	-	-	27	45	2,194	8	2,202	-	-	69	8
54	20	-	4	8	823	566	1,389	-	10	1	29
74	1	2	8	22	2,309	37	2,346	-	-	54	19
70	-	-	40	28	1,956	9	1,965	-	-	61	9
78	-	-	19	27	2,934	100	3,034	-	-	40	35
154	3	3	2	5	4,223	381	4,604	-	1	39	94
591	19	46	91	203	21,376	1,935	25,311	1	6	228	233
56	-	-	21	26	2,122	9	2,131	-	-	48	8
88	3	9	-	-	2,227	661	2,888	-	-	4	48
63	1	1	6	7	1,676	198	1,874	-	-	19	34
77	-	-	-	3	1,925	106	2,031	-	-	22	48
153	-	1	24	46	5,381	229	5,610	-	-	82	66
116	-	3	16	35	4,166	338	4,504	-	-	32	69
111	-	-	28	30	2,594	7	2,601	-	-	105	7
188	55	59	-	-	1,645	6,038	7,683	25	83	1	1
215	29	13	58	35	8,037	2,016	10,053	1	21	27	137
96	17	-	25	19	2,630	578	3,208	5	11	13	60
131	21	2	38	15	3,260	694	3,954	8	13	71	34
91	21	-	11	18	2,549	776	3,325	1	5	4	50
67	2	-	8	11	2,617	213	2,830	-	-	5	56
109	5	6	44	11	3,311	481	3,792	-	6	9	85
135	24	4	26	18	4,100	1,551	5,651	16	4	71	29
107	20	3	31	15	3,808	957	4,765	3	19	39	43
76	18	-	12	9	1,603	426	2,029	11	2	13	42
94	19	-	19	6	1,990	487	2,477	4	14	25	47
102	3	-	42	25	3,229	234	3,463	-	2	11	85
45	13	8	2	2	973	1,287	2,260	5	13	1	10
116	-	2	42	13	3,173	197	3,370	-	-	43	65
131	45	16	8	3	2,260	2,560	4,820	36	43	31	35
160	63	9	20	9	2,354	2,834	5,188	6	58	8	64
67	13	3	20	9	1,317	497	1,814	-	16	5	39
63	24	2	3	6	1,076	675	1,751	13	12	5	26
180	23	34	35	23	4,184	2,505	6,689	2	13	36	44
106	8	5	11	16	2,990	867	3,857	1	-	7	60
76	2	1	18	10	2,275	452	2,727	-	-	27	32
71	1	1	11	12	2,304	187	2,491	-	-	16	48
168	2	4	38	33	4,124	594	4,718	-	2	49	80
69	4	10	13	8	1,963	776	2,739	1	9	11	33
66	-	-	3	4	1,839	51	1,890	1	-	36	26
130	-	-	10	15	4,131	201	4,332	-	-	69	54

Analysis of Student Enrollment and Professional Instructional Staff of One Hundred Largest School Districts, Continued

District	Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Colur
	STUDENTS								
	Enrollment								
	White	Negro	Total White and Negro Enrollment	Total Schools in District	No. of Schools in Which No White Students are Enrolled	No. of Schools Having Less Than 1% White Enrollment	No. of Schools in Which No Negro Students are Enrolled	No. of Schools Having Less Than 1% Negro Enrollment	Wh
Buffalo, N. Y., Erie Co.	43,942	26,381	70,323	101		12	3	2	3
Rochester, N. Y., Monroe Co.	32,016	13,679	45,695	59					2
New York City Public Schools, N. Y., N. Y.	467,365	334,841	802,206	853	59	74	20	25	55
Houston Indep. Schools, Houston, Texas	131,099	81,966	213,065	225	48	14	49	29	7
San Antonio Indep. Schools, Texas	21,310	11,637	32,947	102	14	3	23	22	2
Granite School Dist., Salt Lake, Utah	60,276	59	60,335	67			22	24	2
Fairfax Co. Schools, Fairfax, Va.	117,906	3,322	121,228	152			40	28	5
Norfolk City Schools, Norfolk, Va.	31,824	23,499	55,323	74	21	3	9	4	1
Richmond City Schools, Richmond, Va.	13,542	29,441	42,983	66	30	2	1	3	
Kanawha Co. Schools, Charleston, W. Va.	52,471	3,548	56,019	144			66	112	2
Milwaukee Public Schools, Milwaukee, Wis.	95,089	31,130	126,219	157	3	5	37	30	4
Caddo Parish School Dist., Shreveport, La.	33,909	26,429	60,338	76	26	1	14	13	1
Jefferson Parish School Board, Gretna, La.	46,673	12,812	59,485	71	14		23	7	2
School Dist. of Philadelphia, Pa.	109,512	166,083	275,595	228	9	3	7	17	9
Flint City School Dist., Flint, Mich.	28,645	17,212	45,857	55		1	6	6	1
Jackson Mun. Separate Schools, Jackson, Miss.	20,793	17,919	38,712	59	19		42		
	6,702,430	1,281,418	2,483,848	12,497	1,400	215	5,218	1,786	140

This schedule is subject to comments contained in the accompanying letter of transmittal

3

d Professional Instructional Staff
hool Districts, Continued

Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12	Column 13	Column 14	Column 15
STUDENTS					PROFESSIONAL INSTRUCTIONAL STAFF						
Total Schools in District	No. of Schools in Which No White Students are Enrolled	No. of Schools Having Less Than 1% White Enrollment	No. of Schools in Which No Negro Students are Enrolled	No. of Schools Having Less Than 1% Negro Enrollment	White	Negro	Total White and Negro	No. of Schools Having No White Instructional Staff Members	No. of Schools Having Less Than 20% White Instructional Staff Members	No. of Schools Having No Negro Instructional Staff Members	No. of Schools Having Less Than 20% Negro Instructional Staff Members
101	-	12	1	-	1,439	372	1,811	-	-	21	61
59	-	-	-	-	2,276	165	2,441	-	-	21	29
854	49	34	20	25	55,063	5,002	60,065	-	1	221	533
225	58	43	4	29	1,005	1,285	10,290	8	47	1	154
102	14	9	23	27	2,538	412	2,950	1	2	49	34
67	1	-	2	24	2,534	-	2,534	-	-	67	-
152	6	-	40	28	5,917	124	6,041	-	-	78	71
74	21	4	4	4	1,796	913	2,709	1	18	2	42
88	30	2	1	1	902	1,277	2,179	19	13	4	20
144	-	-	88	11	2,349	152	2,501	1	-	76	58
157	-	5	17	10	4,799	671	5,470	1	1	68	53
70	20	1	14	13	1,543	1,186	2,699	8	19	5	41
41	14	-	23	7	2,080	470	2,550	12	1	19	18
218	9	34	7	1	9,181	4,974	14,255	-	2	3	83
55	-	1	8	8	1,740	450	2,190	-	-	4	28
70	19	-	17	-	936	963	1,599	11	8	31	6
16,422	4,838	233	6,618	1,388	410,337	27,477	437,829	448	882	1,789	5,290

Nominal

EXHIBIT B

PORTIONS OF TESTIMONY IN THE UNITED STATES OF AMERICA v. HINDS COUNTY SCHOOL BOARD

[83] BY MR. SATTERFIELD: May I further inquire of counsel for the Individual Plaintiffs, by the filing of this objection as entitled, as I understand, it is intended at least to be applicable to all cases in which they are individual plaintiffs. Does counsel file this objection recognizing that the motion made by the Department of Justice on behalf of the Secretary and of the United States, does apply to those seven cases with a possibility of the addition of two more?

[84] BY MR. AMAKER: Well, we recognize that, yes.

BY THE COURT: Very well, is the rule invoked? Is there any desire that the rule be invoked? All right. The rule will not be invoked.

Now, Mr. Leonard, do you want to make an opening statement?

BY MR. LEONARD: May it please the Court, Judge Russell and Judge Nixon, I think it appropriate for me to take just a few minutes and I will attempt to be brief, in order to help the Court to understand more clearly what the position of the Government is here and I think a bit of a review with respect to these cases might be helpful for all of us in order to set the framework in which the witnesses that we intend to call are going to testify.

We are here, if I understand correctly, attempting to make a record on which this court is going to make a recommendation to the Fifth Circuit and I think it is important to try to keep possibly that in mind as these witnesses are adduced and examined and their testimony put on the record.

These thirty-three districts—I hope I have the number right and I realize that we are not in all of these cases, but I think again the record ought to reflect that we have addressed [85] our attention to the total group as the order of the Fifth Circuit applied to all of the cases—had been operating under freedom of choice plans under the Jefferson Decree until the Green case was decided in May of 1968. Subsequent to that, either the Government or the private Plaintiffs or both sought orders of this court to require the Boards to disestablish more affirmatively and move more affirmatively from their dual systems to a unitary system, and I think it is fair to say that by enlarge these Boards are not complying with the Court in attempting to move from a dual to a unitary system to that in July the Government found itself in a position before the Court of Appeals where it suggested after consultation with appropriate officials with the Department of H.E.W. and with some precident, the precident being in a bank of cases that were pending in the Courts in South Carolina, and in some other cases, to bring the office of Education and the professional educators in that office in as aids to the Court, as aids to the districts in order to attempt to get some movement from dual to unitary systems and to aid the school boards in attempting to draw plans that would in fact disestablish these dual school systems. I think it is also safe to say that most of the school boards did cooperate in that at least information was provided and the educators were received by the collegues in the districts and were able to draw and pull together the information necessary to provide some kind of a plan.

[86] I think, however, that it became obvious to the Secretary of Health, Education and Welfare that as the time pressure was building here both with respect to the field work that needed to be done, the investigation by his people, out in the field, in the districts, that it soon became

apparent to him that in order to have, in fact, an orderly movement from a dual to a unitary system, in order the accomplish in fact what we believe the Supreme Court seeks, that is a plan that works, one that is going to accomplish the objectives, both with respect to the development of the plans and with respect to the implementation of those plans, that the time was simply too short.

Now, I would be less than candid if I didn't say that the Government was somewhat embarrassed by this because we gave the Fifth Circuit some assurance that there was time but we are lawyers, not educators, and it is the educational judgment it seems to me, that's important here. These are the men who are trained to educate our children. They are the ones that have to make the administrative and the educational decisions that go with bringing about not just a unitary system but a plan for education in the framework of elemination of racial discrimination that's going to, in fact, result in quality education.

I think it is important that the Government's position with respect to the constitutional requirement be made clear. There is no question that we believe that these school boards have an [87] affirmative obligation to disestablish their dual systems and convert to unitary systems, just as soon as it is administratively and educationally feasible to do that on a sound basis and again, pursuant to a plan that is going to work, and I think that is the key to us here. We are going to try to show today that to convert to a unitary system on a sound educational basis requires some real planning, some real preparation but it also requires collaboration from the local school board officials who are public officials elected by the public and who have an affirmative obligation to uphold the law, including the mandates of the Constitution of the United States, and we would hope in this process and through the testimony that we will provide today to show that there

are some techniques, some methods that can be employed to help the administration, the faculty in these school districts to bring that process about, to provide the leadership in these communities which are necessary in order to infact get community support for what is required by the Constitution and I think it is fair to say that unfortunately in too many cases that leadership has not been provided at the local level of Government where it should be provided.

I think that the position that the Secretary of Health, Education and Welfare found himself in was one that he obviously recognized that it would be difficult for the Boards to implement the plans successfully within the time that was provided by [88] by the Fifth Circuit in its orders and that the Boards, not having seriously considered how they were going to develop a program to successfully desegregate these districts, carry this desegregation process out in an educationally sound basis, rather than to be responsible for chaos and confusion that could well result from an implementation within the time period set and obviously have detremental effects on the children and that, after all, is his and our consideration, that it was better to ask the Court to provide some additional time, and thus, that, may it please the Court, is the framework in which the Government has moved pursuant to the Secretary's letter, to seek a delay in the implementation of these plans and to give the office of education and the superintendents and the school boards involved some additional time by collaboration to see if, in fact, some agreement cannot be worked out in order to establish the end of the disestablishment of these districts. Now, it is within that framework we would like to call our witnesses. We will do our very best to try to limit their testimony to the issue at hand here and that's whether or not a delay should be recommended by this court and approved by the Fifth Circuit.

BY THE COURT: I think all counsel should direct their questions to witnesses in that same light. Let's not stray afield here today. We have a limited issue before the Court and I think all counsel [89] should keep that in mind.

BY THE COURT: Is there anything further before we begin testimony? All right, you may call your first witness.

MR. JESSIE J. JORDAN, was thereupon called as a witness and having been duly sworn, testified on his oath as follows:

Direct Examination by Mr. Leonard

Q. Mr. Jordan, would you state your full name, address and your occupation? A. Jessie J. Jordan, 782 Pine Hill Drive, Smyrna, Georgia, which is a suburb of Atlanta. At the present time I am the Senior Program Officer for Title Four in the U. S. Office of Education in the Atlanta Region, based in Atlanta, Georgia.

A. Mr. Jordan, would you briefly state for the benefit of the record, your background in education? A. I have a B.S. Degree in mathematics and Education, a Master's Degree in School Administration. Three years of teaching experience, three years as a principal. Twelve years as a school administrator, director of Transportation, Director of Program, Director of Maintenance and Operations, Assistant Superintendent, General Administration.

Q. How long have you been with the Department of Health, Education and Welfare, and more specifically, the office of Education? [90] A. I have been with the office of Education approximately two years.

Q. And during that period of time would you explain to the Court what your duties have consisted of? A. Title Four of the Civil Rights Act of 1964 is set up to lend technical assistance to school systems with problems incident

to desegregation. This takes four forms. One is the funding of University Centers and Institutes to provide in service training, institute seminar programs and other technical assistance to school systems upon their request. The second form is a grant to State Boards of Education to operate a Title Four office within each State Department of Education. Again, to render technical assistance through the expertees of the State Department upon request of the school system. Thirdly, we operate a grant program to fund grants to local education—boards of education to deal with probrams incident to desegregation, and then we maintain a professional staff in Atlanta to render technical assistance upon request of the school system.

Q. During the period of time that—prior to your coming with the office of education did you have any experiences revolving around the problem of desegregation of the local school system? A. Before coming with the office of education?

Q. Yes, sir. A. Yes, sir; the school system from which I came desegregated [91] in 1967. At that time we eliminated the dual school system.

Q. And where was that? A. That was in Cobb County Georgia.

Q. And what was the size of that system? A. Approximately 40,000 students.

Q. How many schools were there in the system? A. At that time I believe there were fifty-five.

Q. And you indicated that you were a director of transportation at one time, was that in Cobb County? A. Yes, sir.

Q. What was briefly, the extent of their transportation system? A. At that time Cobb County operated approximately 145 to 150 busses transporting about 28,000 students.

Q. During the two years that you have been with the Office of Education, have you been involved with the

problems of desegregation of local school districts? A. Yes.

Q. Would you give us some of the background, some of the states and areas that you have been involved with? A. We operate in a six state area, South Carolina, Georgia, Alabama, Mississippi, Florida and Tennessee. We have had input into a number of desegregation plans at Boards' request in South Carolina, Georgia, Florida and Tennessee. In court-order cases we have worked with some twenty-six in South Carolina, [92] approximately fifteen in Georgia, ten or twelve in Alabama, and approximately forty-five in Mississippi.

Q. You have had occasion, have you not, to testify in Court with respect to the desegregation processing plans from time to time? A. Yes, sir.

Q. With respect to your position with the Office of Education, could you tell us how your duties there relate to the desegregation process specifically? In other words, what do you do with respect to it? A. The framework in which we usually work is when a superintendent or a board, or a superintendent through his board contacts us or the University and asks for assistance in developing a plan, which this is done we go into the school system and work with them to try to develop a plan. We also work with them in other areas, of course, in service training and things of this nature.

Q. And in this process do you become personally familiar with the desegregation plans that are involved? A. Yes.

Q. And the details of the districts? A. Yes, sir.

Q. Can you tell the Court when you first became involved with the cases that are involved in this lawsuit? A. My first involvement in the present court-order in [93] Mississippi was on July 15th.

Q. And what occurred on that date? A. On July 15th, there was a meeting in Mobile, Alabama in which

various Title Four people in our office and other Title Four offices within the country were pulled together to discuss and plan the work ordered by the Court in these particular court-order cases.

Q What occurred from that meeting? A From that meeting there were ten teams formed to contact the school systems. These teams made their first trip into Mississippi beginning the 16th and 17th of July, lasting through the 22nd and 23rd of July. Then these teams returned to Atlanta on the 23rd and worked on putting recommendations together.

Q Let me interrupt Mr. Jordan for just a minute. During this first field trip generally tell the Court what the teams did. A On the first field trip the teams gathered statistical information on enrollment, certain building information, pupil locator maps where available, school location maps, visitation of schools and tried to get a general feeling and input from the school system.

Q. And then you were going to say they returned to Atlanta. What did they do with this information? A They came to Atlanta and worked with this information [94] trying to put together some tentative recommendations for the school system. Then a second trip was made into Mississippi.

Q Can you tell us about when that second visitation occurred? A Yes, sir, that was begun on July 29th through August 1st. At this trip the teams met with the school systems the second time to present some of their recommendations and to try to get input from the school system.

Q Then what happened? A They then returned to Atlanta during the period of August 2nd to August 6th, they formalized the plans that they were working on to recommend to the Board. After they had been formalized, duplicated and so forth, a third trip was made into Missis-

... from the 7th through the 9th at which time the plans were formally presented to the superintendent or the board or whoever the superintendent wished present, and then on August 11th they were filed with the Court.

Q. Tell me, at what point in this process did you personally become involved? A. I did not make any trips into Mississippi. I was coordinating the over all effort of those field coordinators and so forth and reviewing with the teams a member of a review team of the plans as they were put together.

Q. And what did your personal involvement in that review process consist of? [365] A. The team that developed the plan presented the plans to us and we had critical questions about the plans.

Q. But that team was that the team members themselves? A. Yes.

Q. Did the review members have any input in the plan development itself? A. The committee did not actually develop the plans they did examine the plans and they accepted the plans.

Q. The review members then was more or less an advisory committee to iron out any problems that needed to be corrected? A. That is correct.

Q. Incidentally Mr. Jordan, do you have an opinion as to whether or not an unitary school system is superior education as to the dual system? Q. Yes I think the unitary system is far superior to the dual system.

Q. Could you tell us what educational grounds you base that opinion on? A. To learn to live in this society I think it important to students to be trained in a desegregated setting so that they learn of the culture of the other. If they are going to live in adult life together, then they should be trained together. Statistics and research has shown the advantage to students that do better work in a desegregated setting than they do in a segregated setting.

Q Mr. Jordan, earlier in your testimony when you were discussing the second visitation that was made by the teams to the school districts involved here, you mentioned that they attempted to get in put from the district, from the board and the personnel. Could you amplify that a little bit? What do you mean by in put? A Well, what we actually tried to do, I believe was for the Superintendent and members of the Administrative Staff to give the team any idea they had to give the team any ideas they might have that should be incorporated into a desegregated plan or any ideas they had for a desegregation plan.

Q Mr. Jordan, have you had in your experience situations where by doing the preparation process that you testified to, that the school administrators and the faculty and the boards are in the position to provide some community leadership in order to smooth out the desegregation problems? A Yes sir, of course the educational leadership in any [199] school system is the Superintendents, Principals, Supervisors, and teachers. This is the only group that can represent the educational leadership, and if they are adequately trained and prepared, they can, indeed, be an educational leader within a group to insure a smoother, more acceptable movement from a dual to a unitary school system.

Q Mr. Jordan, the motion filed by the government would envision that your office would need to work with the school districts in developing this preparation program you testified to. Do you believe the capacity of your office can handle such a program? A We have the facilities of the University of the Title Four Center and we have the facilities of the Atlanta Office. We also would have the assistance of the State Department, the Title Four office in the State Department of Education. I think there would be ample personnel, but I can not guarantee you there would be enough dollars.

Q But it is your opinion that if the dollar resources are available, the personnel would be available to carry this out? A That is correct.

Q Can you give the Court a specific example of where the in-service program, the preparation program that you testified to was used in a desegregation plan? A Yes, sir. Twiggs County, Georgia T W I G G S Twiggs County began a preparation program a year ago by attending work shops we provided at the University of Georgia. I believe almost their entire faculty attended a three week [1001] session at the University of Georgia on desegregation planning and the problems involved in it. Then, the work shop continued during the school year that has just ended, throughout the school year. Throughout that period of time a desegregation plan was designed. The plan was a two-step plan involving movement in 69 and completed the job in 1970. The plan was not under court order. The plan was adopted by the Twiggs County Board of Education and will begin implementation in 1969. Twiggs County is a majority district of about seventy per-cent black.

Q Have you had opportunity to see some of the results specifically of that program? A The University people tell me that where they have held this workshop they have seen remarkable change and attitude among teachers.

Q Do you feel in your opinion as an educator, Mr. Jordan, that the attitude of the faculty and the administration of the school district has an impact on the end results itself? A Yes, sir.

Q And of the students? A Yes, definitely on the students.

Q And is it your opinion that this leads to a greater acceptance of movement from a dual to a unitary school

system? A This is correct, this is what we consider proper planning.

Q I have no further questions.

BY MR. CANNADA: We have no questions, if the Court please.

BY THE COURT: [101] All right.

* * *

EXHIBIT C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

Nos. 28030 and 28042

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

HINDS COUNTY SCHOOL BOARD, et al.,
Defendants-Appellees.

(And Consolidated Cases)

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

MOTION IN THE COURT OF APPEALS

The United States moves this Court for an order amending its order of July 3, 1969 and subsequent amendments thereto in accordance with the proposed amendment order attached hereto.

This motion is based upon the following considerations:

By letter dated August 12, 1969 (a copy of which is attached) to Honorable William Harold Cox, Chief Judge, United States District Court for the Southern District of Mississippi, Secretary Robert H. Finch of the Department of Health, Education and Welfare requested to be per-

of the Office of Education may go into each district and develop meaningful studies in depth and recommend terminal plans to be submitted to the Court not later than December 1, 1969.

Sincerely

Secretary

ROBERT H. FINCH

cc: Hon. Dan M. Russell, Jr.
Hon. Walter L. Nixon, Jr.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

Nos. 28039 and 28042

UNITED STATES OF AMERICA,
Plaintiff-Appellant

HINDS COUNTY SCHOOL BOARD, et al
Defendants-Appellees

(And Consolidated Cases)

Appeals from the United States District Court for the Southern District of Mississippi

Amended Order

The Court shall approve such plan unless within 15 days after submission to the Court any party files any objection or proposed amendment thereto alleging that the plan, or any part thereof does not conform to Constitutional standards.

5. If no agreement is reached, the Office of Education shall present its proposal for a plan for the school district to the District Court on or before December 1, 1969. The parties shall have 15 days from the date such a proposed plan is filed with the District Court to file objections or suggested amendments thereto. The District Court shall hold a hearing on the proposed plan and any objections and suggested amendments thereto, and shall promptly approve a plan which shall conform to Constitutional standards. The District Court shall enter Findings of Fact and Conclusions of Law regarding the efficacy of any plan which is approved or ordered to disestablish the dual school system in question. Jurisdiction shall be retained until it is clear that disestablishment has been achieved.

*

.....

August , 1969.

EXHIBIT D

Caption of Cover Page Not Included Here

MOTION BY THE DEFENDANTS IN THE ABOVE STYLED CONSOLIDATED CASES JOINING IN THE MOTION THEREIN FILED BY THE ATTORNEY GENERAL OF THE UNITED STATES IN BEHALF OF SECRETARY ROBERT H. FINCH OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE AND THE UNITED STATES OF AMERICA

Now come all of the defendants in the above styled consolidated cases and join in the motion filed therein by

the Attorney General of the United States entitled "UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT HINDS COUNTY SCHOOL BOARD, ET AL., DEFENDANTS-APPELLEES (AND CONSOLIDATED CASES)—MOTION IN THE COURT OF APPEALS" filed in this Court on or about August 21, 1969, and show to the court the following:

1. This motion is filed in the United States Court of Appeals for the Fifth Circuit by permission of the United States District Court for the Southern District of Mississippi granted in open court and made of record therein.

2. That the said motion thus filed in this Court on or about August 21, 1969, was filed in the consolidated proceedings numbered upon the docket of this Court as "Nos. 28030 and 28042", particularly referring to the first listed case of the UNITED STATES OF AMERICA VS. HINDS COUNTY SCHOOL BOARD, ET AL. and particularly being filed not only applicable to said case but applicable to it "AND CONSOLIDATED CASES".

3. That there were appealed to this Court and assigned the above docket numbers twenty-five school desegregation cases involving a total of thirty-three school districts. That the said twenty-five consolidated cases included those listed above in which this Motion of Joinder is filed.

4. That in the opinion and mandate of the Court of Appeals dated July 3, 1969, the following findings were made:

> These are twenty-five school desegregation cases *in a consolidated appeal* from an en banc decision of the U. S. District Court for the Southern District of Mississippi. . . .
>
> The order of the District Court *in each case* is reversed and the cases are remanded to the District Court with the following direction:

1. These cases shall receive the highest priority.

2. The District Court shall forthwith request that educators from the Office of Education of the United States Department of Health, Education and Welfare collaborate *with the defendant school boards in the preparation of plans to disestablish the dual school systems in question* . . . (Emphasis ours.)

4. That the United States District Court for the Southern District of Mississippi requested the United States Department of Health, Education and Welfare to collaborate with the defendant school boards "*in each of these cases*" and to file plans of desegregation for all of the defendant school districts, including the defendants making this Motion. That on or about August 11, 1969, proposed plans of desegregation were filed by the United States Department of Health, Education and Welfare in each of the above cases.

5. That in accordance with the mandate of this Court and the direction of the said District Court each of the above defendant school districts filed proposed plans of desegregation on or about August 11, 1969, reserving, however, all of their rights existing under the order of the District Court dated May 16, 1969, the appeal therefrom to the United States Court of Appeals for the Fifth Circuit, the Petition for Rehearing en banc now pending before this Court, the right to file a petition for Writ of Certiorari with the Supreme Court of the United States and all other rights existing in them. Such plans were filed subject to such reservation.

6. On or about August 21, 1969, these defendants filed additional motions for supplemental relief, including prayer that the Court grant additional time for further collaboration between the Department of Health, Education and Welfare and the defendants with plans to be submitted

not later than December 1, 1969. The motions filed by the three school districts above named in Civil Action No. 1209(W) in the District Court, The Yazoo County Board of Education, The Yazoo City Municipal Separate School District and The Holly Bluff Line Consolidated School District alleged that within the time allowed it was "impossible to work out a plan satisfactory to either the Court, the defendants or the plaintiff". Similar allegations were made by the other defendant school districts.

7. These movants join in the motion to amend the mandate of this Court filed in behalf of the Secretary of Health, Education and Welfare and by the United States of America as the same was filed on or about August 21, 1969, joining in the allegations and prayer thereof as it was filed and joining in the motion for the amendment of the mandate as therein stated.

8. These defendants by this motion adopt any proof which may be introduced in the said District Court in support of the said Motion as it was filed on or about August 21, 1969, but do not adopt any amendment, should an amendment be requested. These defendants adopt the proof which may be presented in behalf of the Secretary of Health, Education and Welfare and the United States of America solely to the extent that such proof supports the said Motion as it was filed.

9. That said motion is proper and sufficient, but these defendants join therein because of the "OPPOSITION TO MOTION FOR PERMISSION TO WITHDRAW PLANS FILED BY THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE" which has been filed by attorneys for certain individual plaintiffs in this consolidated appeal. These defendants deny all of the allegations and conclusions set forth in such "OPPOSITION TO MOTION" to the extent that such allegations are inconsistent with this

Motion and the Motion filed herein in behalf of the Secretary of Health, Education and Welfare and by the United States of America.

WHEREFORE, these defendants join in the said Motion as filed herein on or about August 21, 1969, including the prayer for relief therein contained.

Executed under authority granted in open Court and respectfully submitted this 23rd day of August, 1969.

CALVIN R. KING, Attorney for Holmes County Board of Education, et als., Civil Action No. 2779(J) in the District Court

BRIDGEFORTH & LOVE; CAMPBELL & CAMPBELL; SATTERFIELD, SHELL, WILLIAMS & BUFORD, Attorneys for The Yazoo City Municipal Separate School District, The Yazoo County Board of Education and The Holly Bluff Line Consolidated School District, Civil Action No. 1209(W) in the District Court

HAROLD M. DAVIDSON, Attorney for Leake County School Board, et al., Civil Action No. 3382(J) in the District Court

HERMAN GLAZIER, Attorney for The Issaquena County Board of Education, et al., The Sharkey County Board of Education, et al., The Anguilla Line Consolidated School District, et al. and The Sharkey-Issaquena Line Consolidated School District, et al., Civil Action No. 1096(W) in the District Court

TALLY D. RIDDELL and ROBERT H. COVINGTON, Attorneys for The Enterprise Consolidated School District, et al., The Quitman Consolidated School District, et al., and The Clarke County Board of Education, et al., Civil Action No. 1302(E) in the District Court

By:
/s/ John C. Satterfield
John C. Satterfield, Attorney

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion by the Defendants in the above Styled Consolidated Cases Joining in the Motion Therein Filed by the Attorney General of the United States in Behalf of Secretary Robert H. Finch of the Department of Health, Education and Welfare and the United States of America were served on the plaintiffs on this 23rd day of August, 1969, by mailing copies of same, postage prepaid, to their counsel of record at the last known address as follows:

Melvyn R. Leventhal
Reuben V. Anderson
Fred L. Banks, Jr.
John A. Nichols
538-1/2 North Farish Street
Jackson, Mississippi 39202
Jack Greenberg
Jonathan Shapiro
Norman Chachkin
Suite 2030
10 Columbus Circle
New York, New York

I further certify that I have also mailed a copy of said Motion to the Department of Health, Education and Welfare of the United States addressed as follows:

Mr. J. J. Jordan, Regional Director
United States Office of Education
Room 404
50 Seventh Street, N. E.
Atlanta, Georgia 30323

/s/ John C. Satterfield
Of Counsel

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SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 8 1969
JOHN F. DAVIS, CLERK

Nos. 632 & 713

VOLUME II

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 632

BEATRICE ALEXANDER, et als.,
Petitioners,

vs.

HOLMES COUNTY BOARD OF EDUCATION, et als.,
Respondents.

(Including Consolidated Cases)

APPENDICES TO CROSS-PETITION FOR WRIT OF CERTIORARI AND MOTION TO EXPEDITE HEARING

JUDGE A. F. SUMMER
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New Capitol Building
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Special Counsel for the Respondents, other than the United States of America, associated with other attorneys of record in each of the Consolidated Cases

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